82-748

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

1982-1983 TERM

FREDERICK A. WEIN, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF OTHERS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT

V.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA AND THE STATE BAR OF CALIFORNIA,

DEFENDANT-APPELLEE

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FREDERICK A. WEIN
ATTORNEY FOR PLAINTIFFS
600 Laramie Avenue
Wilmette, Illinois 60091
(312) 256-4971

PETITION FOR CERTIORARI

Statements required under Rule 21 are as follows:

Questions Presented

Question No. 1

Whether in federal question jurisdiction each federal court exercises the judicial power of the United States which is co-extensive with the boundaries of the United States, due process requiring only that a defendant in a federal suit have minimum contacts with the United States, the sovereign that has created the court, and that such nationwide personal jurisdiction can be perfected by service using any method authorized by Rule 4, Federal Rules of Civil Proceedure?

Question No. 2

Whether plaintiff, consistant with due process, can constitutionally acquire long-arm personal jurisdiction over defendant which has the following minimum contacts with the forum State of Illinois:

1. Through the years, defendant has requested and received from thousands of

applicants certification from the Illinois Supreme court and law schools in Illinois and derived benefit from the educational institutions located in Illinois;

2. Through the years defendant has received millions of dollars in fees from Illinois applicants for taking the bar exam and received at least $47,700 for the exam in issue;

3. Over the years, defendant has corresponded with Illinois applicants by mail, such correspondance including the sending of applications, admissions materials, acknowledgements of filings, and other documents and correspondance;

4. Through the years, the multistate portion of the bar examination which counts for 40% of the California bar exam is given in Illinois and such grades are accepted and transferrable to defendant;

5. 159 applicants from Illinois took the bar exam in issue and over the many years,

many thousands of applicants from Illinois have taken the exam, which typically has a passing rate of 50%. For those failing the exam, defendent sends on its own initiate, a solicitation to reapply to take the subsequent exam and solicits a monetary fee of at least $230.00, which for the exam in issue, comes to approximately $18,400.00, with similar amounts for each exam given twice a year over the many years;

6. There are 413 members of defendant who are citizens of Illinois and defendant monthly mails such members literature, a bar journal, and other promotional advertisements wuch as for cruises and group insurance including a yearly solicitation through the years for said members to attend a state bar meeting in California held each year;

7. Defendant characterizes itself as a state agency and claims Eleventh amendment and judicial immunities thereby. The State of California, through the years, maintains

offices of the California State Franchise Tax Board and the California State Board of Equilization, both boards concerned with tax matters involving the State of California;

8. Defendant regularly sends bar examiners to attend seminars given in Chicago Illinois;

9. Defendant on a regular and continuous basis contracts with and pays a monetary fee to the National Conference of Bar Examiners to investigate and report on the character and fitness of all out-of-state applicants applying to defendant to take their bar exam, and

10. Defendant has attempted to submit a bill of costs with the clerk of the Court of Appeals for the Seventh Circuit and in so attempting to file, defendant has attempted to derive a direct benefit of the courts and laws of Illinois and attempted to use the court as a sword, not as a shield. In Illinois state courts, such activity would by itself be sufficient to defeat any special appearance made?

Question No. 3.

Whether the district court and the court of appeals erred in refusing to permit plaintiff to conduct any discovery in order to prove jurisdictional matters of which plaintiff has the burden of proof?

Question No. 4

Whether plaintiff's second amended complaint is sufficient under Rules 8,9,10, 12 and 23, Federal Rules of Civil Procedure?

Question No. 5

Whether plaintiff has sufficient nexus with the forum state to withstand a motion to transfer for forum non-convience under 28 USC 1404(a) and maintain the present situs of venue?

Question No. 6

Whether plaintiff has subject matter jurisdiction to maintain the action in the Federal Courts and whether the district court and the court of appeals erred in refusing to reach this issue?

TABLE OF CONTENTS

	pages
Considerations Governing Review	1
Nationwide Personal Jurisdiction	3
Personal Jurisdiction-Traditional Minimum Contacts	4
Discovery	22
Sufficiency of the complaint	25
Subject Matter jurisdiction	27
Forum non-convenience and Venue	31
APPENDIX	
Order of the Court of Appeals for the Seventh Circuit dated June 29, 1982	A1
Order of the Court of Appeals denying petition for rehearing and suggestion for rehearing en banc dated August 5, 1982	A19
Judgment of Court of Appeals dated June 29, 1982	A20
Memorandum and Order of the District Court dated July 23, 1982	A21
Memorandum and Order of the District Court dated September 15, 1981	A34
Order of District Court dated May 12, 1981, entered May 13, 1981	A36

Second Amended Complaint A37

Notice of Appeal A61

Motion to Supplement the Record, etc. A62

Portion of PLaintiff's reply brief A72

TABLE OF AUTHORITIES

pages

Aamco Automatic Transmissions Inc. v. Tayloe, 368 F.Supp. 1283 24

Braband v. Beech Aircraft Corp. 51 ILL App.3d 296, 367 NE2d 118 13,3

Burstein v. State Bar of California 659 F2d 670 (5CA 1982) 16

Conley v. Gibson, 355 US 41 (1957) 26

Consumers Union v. Virginia State Bar, 100 S.Ct. 2980 (1980) 30

Driver v. Helms, 577 F2d 147(1CA 1978) 4,1

Electro-craft Corp. v. Maxwell Electronics Corp. 417 F2d 365 19,21

Feldman v. Garner, 661 F2d 1295 30

Fissons Limited v. U.S. 458 F2d 1241 13

Fitzsimmons v. Barton 589 F2d 330 1,4

FTC v. Jim Walter Corp. 651 F2d 251 1,3

Goldfarb v. Virginia State Bar 421 US 773 (1973) 27

Gomillion v. Lightfoot 364 US 339 (1960) 27

Great Western United Corp. v. Kidwell, 577 F2d 1256 8,22

Hickey v. District of Columbia Court of Appeals, 661 F2d 1295 30
Hutter Northern Trust v. Door County Chamber of Commerce, 403 F2d 481 10

Jiffy Lubricator Co. v. Alemite Co. 28 F.Supp. 385 24

Keenan v. Bd. of Law Examiners 317 F.Supp. 1350 29

Law Students Civil Rights Council, Inc. v. Wadmond, 299 F.Supp.117 29
Lipman v. Van Zant, 329 F.Supp. 391 29

N.A.A.C.P. v. Button, 371 US 415 28

Perkins v. Benquet Consolidated Mining Co. 342 US 437 13
Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392 28
Process Control Corp. v. Witherup Fabrication and Erection Inc. 439 F.Supp. 1284 24
Product Promotions Inc. v. Cousteau 495 F2d 483 18,20

Reynolds v. Sims, 377 US 533 27
Ronwin v. State Bar of Arizona 663 F2d 914 31

Schware v. Board of Examiners 353 US 232 28
Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967 30

Terry v. Raymond Intern Inc. 658 F2d 398 4
Theard v. United States, 354 US 278 29

Webster v. Wofford, 321 F.Supp.1259 29
Wilkerson v. Fortuna Corp. 554 F2d 745 9

Rule 17(d): There are no official or unofficial reports of the opinions issued in this case. The district court opinion is presented in the appendix at pages A21 and A34. The decision of the Court of Appeals for the Seventh Circuit was issued as an unpublished order and is presented at page A1.

Rule 17(e): The judgment of the Court of Appeals for the Seventh Circuit which is appealed from was issued June 29, 1982 and entered on that date. Rehearing was denied August 4, 1982 and entered August 5, 1982. This court has jurisdiction to review the judgment by writ of certiorari under 28 USC 2101.

Rule 17(f): The constitutional provisions which the case involves are the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Additionally, Rules 8,9,10,12 and 23 Federal Rules of Civil Proceedure are involved.

Rule 17(g) CONCISE STATEMENT OF THE CASE

The present civil action was brought in the United States District Court for the Northern District of Illinois under the U.S. Constitution, the U.S. Anti-trust statutes, U.S. Civil Rights statutes, and various common-law causes, and invoked jurisdiction under the above and 15 USC 4, 28 USC 1331, 28 USC 1332, 28 USC 1337, 28 USC 1343, and Chapter 110, § 16,17 and 18 Illinois Revised Statutes.

Defendant, a public corporation of the State of California with headquarters and offices in California, moved under Rule 12 FRCP to dismiss the case grounded, inter alia, that the district court lacked personal jurisdiction over defendants,and subject matter jurisdiction relating to the issues and relief sought, the Eleventh Amendment to the U.S. Constitution, and judicial immunity. During the course of proceedings, numerous other issues arose, including inter alia, the dismissal of the amended complaint

under all twenty four grounds urged by defendant under rules 8,9,10,12 and 23 Federal Rules of Civil Procedure, the refusal of the district court to permit discovery relative to personal jurisdictional matters of which plaintiff has the burden of proof, and the sufficiency of form of the second amended complaint. The district court dismissed the action for lack of personal jurisdiction and declined to decide subject matter jurisdiction.

The Court of Appeals for the Seventh Circuit affirmed dismissal for lack of personal jurisdiction, affirmed the refusal to permit discovery relative to personal jurisdiction matters, and declined to decide subject matter jurisdiction and dismissal of the complaint for sufficiency under Rule 12, FRCP but implied approval of the dismissal under Rule 23 FRCP.

CONSIDERATIONS GOVERNING REVIEW UNDER RULE 17

The present decision is in conflict with the decision of Federal Trade Commission v. Jim Walter Corp., 651 F2d 251,(5CA 1981) that federal courts have nationwide jurisdiction in federal question cases, that the district court's jurisdiction is always potentially co-extensive with the boundaries of the United States in federal suits and that due process only requires that a defendant in a federal suit have minimum contacts with the United States, the sovereign that created the court. See also Fitzsimmons v. Barton, 589 F2d 330 (7CA 1979) and Driver v. Helms, 577 F2d 147 (1CA 1978). The present case was brought under the U.S. Constitution, U.S. Anti-trust statutes and U.S. Civil rights statutes.

This issue was briefed by both parties on appeal but was ignored by the Court of Appeals. The portion of plaintiff's brief on the subject appears in Appendix pages

A 80-85.

2. The judicial opinions in the present case significantly depart from the accepted course of judicial proceedings regarding long-arm personal jurisdiction, subject matter jurisdiction, sufficiency of the complaint, and discovery and present a singular approach only applied to plaintiff. Such departure by the two lower courts calls for the exercise of this Court's power of supervision. Plaintiff has shown in the lower courts that defendantis traditional minimum contacts with the forum state are substantial and continous. However, there seems to be an overriding public policy question which makes it onerous for the courts in Illinois to accept personal jurisdiction over defendant and for this reason, defendant's minimum contacts which were established are largely ignored or trivialized despite such contacts having been able to be shown without being permitted discovery regarding personal

jurisdiction matters which plaintiff has the burden of proof.

QUESTION No. 1 NATIONWIDE PERSONAL JURISDICTION

The issue of nationwide personal jurisdiction was briefed by the parties and argued at oral hearing. However despite such activity by the parties and the interest in the subject by the Court of Appeals for the Fifth Circuit in Burstein v. State Bar of California, 659 F2d 670 (5CA 1982) (since withdrawn for rehearing on nationwide personal jurisdiction), this basis for plaintiff to acquire personal jurisdiction over defendant was completely ignored by the court.

As stated in plaintiff;s reply brief, a pertinent portion of which is presented in the appendix at pages A80-85 and incorporated by reference herein, nationwide personal jurisdiction for a federal question is well stated in FTC v. Jim Walter Corp., 651 F2d 251 (5CA 1981) in that each federal court exercises the judicial power of the United States which is co-extensive with the boundaries of the United States and that

due process requires only that a defendant in a federal suit have minimum contacts with the United States, the sovereign that has created the court. In accord is Driver v. Helms, 577 F2d 147 (1CA 1978), Fitzsimmons v. Barton, 589 F2d 330 (7CA 1979). The present case was brought under the U.S. Constitution, U.S. Anti-trust Statutes and U.S. Civil Rights Statutes.

In such nationwide personal jurisdiction service can be had by any method authorized by Rule 4, Federal Rules of Civil Procedure, and in the present case, Rule 4(e) which utilizes the method of service authorized by the Illinois Long-Arm Statute, inasmuch as process of service and jurisdiction are seperate and distinct. See Terry v. Raymond Intern Inc., 658 F2d 398 (5CA 1981); Driver v. Helms, 577 F2d 147 (1CA 1978).

QUESTION No.2 TRADITIONAL MINIMUM CONTACTS

Let us now examine the contacts of defendant and the extent of said contacts with the forum State of Illinois.

1. 159 Applicants from Illinois took

the exam in issue of July 1980. This is only one examination. Undoubtedly many thousands have taken the bar exam over the years. For these thousands of applicants, certification by a Justice of the Illinois Supreme Court is required as is certification of applicant's law school in Illinois. Using 154 as a typical number and ignoring any probable increase, this means that over a period of 10 years there will be 1,540 applications from Illinois alone at an average charge of $300.00 each (also ignoring any probable increase) with these applicants having the same contacts. Defendant also utilizes to their own benefit the education derived from educational facilities in Illinois. Surely, Illinois has an interest in protecting its citizens with regard to such systematic and continuous contacts.

2. Defendant receives monetary fees ranging from $210.00 to $395.00 depending upon circumstances. Assuming an average

fee of $300.00 (plaintiff understands that the fees have increased) income to defendant is $47,700.00 from Illinois for this exam alone. Over the years, it is reasonable to assume that defendant's income from the State of Illinois would be many hundreds of thousands if not millions of dollars. Thus, defendant derives substantial income from the forum State of Illinois, and derives substantial benefits from the banking facilities and the economy of the state.

3. Receipt of all applicant's applications are acknowledged by mail and admissions materials are mailed to Illinois as well as other correspondance.

4. Fourth percent of the California Bar Examination is given in Illinois and defendant accepts the results of the multistate portion of the bar exam. This would apply to almost all of the 159 applicants and of almost all of the many thousands of past and future applicants from Illinois.

5. A typical passing rate in a July exam is 50% and a typical passing rate for a February exam is 30%. Assuming arguendo a passing rate of 50%, one half of all those Illinois applicants fail the exam. Along with the notice of failure defendant provides a direct solicitation for the subsequently given exam. This solicitation comprises application forms and a solicitation for a monetary fee of $230.00 to retake the exam. This solicitation is made by defendants without any request by applicants, is a purposeful activity under taken by defendant, and is certainly not a "unilateral activity" as will be further discussed hereinafter. Thus, from approximately 80 applicants from Illinois failing the exam, defendant solicited approximately $18,400.00 for this exam alone, not to mention the hundreds of thousands of dollars solicited from the many thousands of past and future applicants from Illinois.

The mailing of application forms and request for monetary fees from failing

applicants without any request from said failing applicants is not just a notification of failure, It goes far beyond that. It is an express overt solicitation, a purposefull activity, not just a providing of information as the lower courts have characterized it in an attempt to trivialize the activity.

6. There are 413 members of the State Bar of California who are citizens of Illinois. Defendant mails such members literature, a monthly bar journal, and other promotional advertisements such as for cruises or group insurance which surely are solicitations within the State of Illinois and purposeful activity within the State by defendant. In his reply brief, plaintiff submitted an example of solicitations made by the California bar journal soliciting members to attend the state bar meeting in California which is held every year. These 413 members yearly receive such purposeful solicitations from defendant and have received such for

the past many years. See Wilkerson v. Fortuna Corp. 554 F2d 745 (5CA 1977). The court of appeals has completely ignored this minimum contact.

7. Plaintiff has shown that the State of California maintains offices in Illinois for tax purposes and thus has continuous substantial contacts with the State of Illinois. The court's order states that it is plaintiff which characterizes defendants as a "state agency". This is not correct. It is defendant which characterizes itself as a state agency in order to claim Eleventh Amendment immunity and Judicial immunity as stated in defendant's motion to dismiss in the district court and defendant's statement re certificate of interest under Circuit Rule 5(b). Since they themselves claim to be a state agency, plaintiff submits that this is an admission for personal jurisdiction purposes. Thus, the contacts of the State of California by main taining offices in Illinois are continuing

and purposeful activity by the State of California within the State of Illinois and are also contacts of defendant for personal jurisdiction purposes. See Hutter Northern Trust v. Door County Chamber of Commerce, 403 F2d 481 (7CA 1968).

8. Prior to oral argument, it came to plaintiff's attention, despite that discovery had been denied to him, that defendant has other substantial and continuous contacts with Illinois and plaintiff attempted to bring this to the court's attemption by way of motion. See Appendix pages A-62 to A-71. In their opinion, the court of appeals states that plaintiff "alleged" that bar examiners attend a seminar held in Chicago every two years. This is no longer an allegation. Defendant has refused to respond to the motion and the failure to deny stands as an admission. Such attendance is now an established evidentiary fact.

While the bar examiners are in atten-

dance at the seminar in Chicago, if they are mugged or robbed, would they not have a right to assistance by the Chicago police and the Illinois courts? If there is a dispute over the hotel bill, would they not have recourse to the Illinois courts? Are these not benefits of conducting business in the forum?

9. The motion in the court of appeals reproduced in the Appendix at pages A62-71, also states and it is r[illegible] an established evidentiary fact by virtue of defendant's failure to deny, that defendant has continuous and substantial purposeful activity with the National Conference of Bar Examiners headquartered in Chicago, Illinois. The court phrases this activity as "obtains information" which is an incorrect trivialization of the activity. Defendant engages and retains, on a continual basis, for monetary consideration, the National Conference of Bar Examiners (NCBE) to investigate the character and fitness of out-of-state

applicants and to report the results of the investigation to defendant. This is a purposeful business activity engaged in by defendants within the state on a continuing basis as such hiring of services of NCBE within the state of Illinois is an ongoing activity for each sucessive bar examination given. NCBE is a hired investigator not only for Illinois applicants, but of all out-of-state applicants for each examination. The numbers of such applicants and the fee paid for investigation is not known by plaintiff having been denied discovery in both the district court and the court of appeals, however, the numbers of applicants and fees paid to NCBE can be presumed to be substantial over the long period of years.

Additionally, if there arises a dispute connected with the business relationship with NCBE, would defendant not be able to avail themselves of the Illinois courts to enforce their rights? Is this not a benefit of conducting business in the forum?

10. Defendant has attempted to submit a bill of costs to the Clerk of the Seventh Circuit Court of Appeals. In so doing, defendant has attempted to derive a direct benefit of the courts and laws of Illinois and attempted to use the court as a sword and not as a shield. In the Illinois State courts such activity would be itself be sufficient to defeat any special appearance made and to assert personal jurisdiction over defendants.

As to all of the above contacts, it is permissible to exercise personal jurisdiction even if the cause of action arose from activities entirely distinct from such conduct within the state. See Perkins v. Benquet Consolidated MIning Co., 342 US 437, Fissons Limited v. U.S., 458 F2d 1241, (7CA 1972) and Braband v. Beech Aircraft Corp. 51 Ill App.3d 296, 367 NE2d 118 (1972), aff'd 72 Ill 2d 548.

The court further states that "An essential criterion for establishing the

reasonableness of subjecting a nonresident defendant to litigation is "that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." and then further states that the contacts shown do not demonstrate any purposeful activity/which defendants have availed themselves of the benefits of conducting business in the forum. through

Plaintiff has shown hereinabove numerous instances wherein defendant has conducted purposefull activity in the forum. Is not accepting over a period of years thousands of applications from the forum state a purposeful activity in the forum? Is not the requiring of certification of applicants from within the forum state a purposeful activity in the forum? Is not accepting $47,700.00 from within the forum state for just one examination a purposeful activity within the forum? Is not the carrying out

of continuous mail correspondance with applicants within the forum a purposeful activity in the forum? Is not the giving of a portion of the California bar examination in the state a purposeful activity in the forum? Is not the soliciting for subsequent examination attendance and soliciting $18,400.00 for just one exam from applicants in the forum state, much less many other exams over the years, a purposeful activity in the forum? Is not the travel of bar examiners into the state to attend seminars a purposeful activity in the forum? Is not soliciting travel to California purposeful activity in the forum? Is not the application to the courts of the state to enforce from plaintiff defendant's costs a purposeful activity in the forum? The only thing that seems to be missing is for defendant to be headquartered in Illinois and this is surely not necessary for personal jurisdiction.

The order then goes on to rely heavily

upon the withdrawn opinion in Burstein v. State Bar of California, 659 F2d 670 (5CA 1982). Since the opinion was withdrawn, How can the court be sure that the withdrawn opinion represents the current thinking of the Burstein panel? Moreover,many of the contacts of defendant with Illinois were different in kind from the contacts with Louisiana and those that are the same are present here to a much greater degree. Additionally, the Burstein panel shown considerable interest in nationwide jurisdiction for federal questions. This issue was presented to the court but ignored.

The court then continues to talk about "unilateral activity". There is no per se constitutional requirement that the activity not be "unilateral". Assuming arguendo that unilateral activity does not quality for minimum contacts, plaintiff has demonstrated numerous non-unilateral activities of defendant in the forum state. For example,

soliciting subsequent examination applications from those who have failed is certainly not unilateral activity. Nor is soliciting $18,000.00 from applicants for just one exam much less many other exams, or soliciting travel from Illinois to attend State Bar functions from 413 members, or the State of California maintaining offices in Illinois, or travel of California State Bar examiners into the State of Illinois to attend seminars, or the contracting with NCBE in Chicago, Illinois to investigate, for a fee, thousands of applicants each year to accomplish one of defendant's business purposes.

The court then goes on to state that the activities are with "persons who happen to be Illinois residents". How else could it be? All contacts with any forum must be with persons or organizations which by circumstance just happen to be in the forum. This does not make it any less a minimum contact. The court would negate all activity of any organization or person with any forum

state and just leave the absurdity of activities with inanimate real estate in the forum state to establish minimum contacts.

The court refers to the transactions shown hereinabove as "sporadic and fortuitous". How can they be sporadic? They are repetative and continuous. If these activities are fortuitous, then all activity qualifying for long-arm jurisdiction minimum contacts are also fortuitious as it just happens that persons or organizations located within the particular state for which minimum contacts are sought, by chance, happen to be in the particular forum state and could have been elsewhere. Moreover, the convenient painting with a broad brush of labels such as unilateral activity, sporadic, and fortuitious are not constitutional considerations.

The cases relied upon by plaintiff, e.g. Great Western United Corp. v. Kidwell, 577 F2d 1256 (5CA 1978), Product Promotions, Inc. v. Cousteau, 495 F2d 483 (5CA 1974), and

Electro-craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8CA 1969) are blithely distinguished based upon exertion of control in the forum state, producing substantial effects on business in the forum, or reasonable anticipation that business would have direct consequences in the form, none of which are constitutional considerations. What is business in the form? Can it be said that the alleged practices of defendant do not have substantial effects on business in the form? To those who take the exam, they do. The activities of defendant have direct consequences in the form as to those applicants who in good faith apply in anticipation of fair treatment and are not fairly treated. If defendant did not anticipate being haled into court in Illinois, they have been wearing blinders. Anyone who conducts affairs as alleged in the complaint knows or should have known with anticipation and foresight that they could be haled into a court

outside of their safe sanctuary within their own state.

The cases relied upon by plaintiff for finding personal jurisdiction with "unilateral activity" are as follows:

Products Promotions Inc. v. Cousteau, 495 F2d 483 (5CA 1874) shows a case where plaintiffs, a Texas company searched out and sought Cousteau in France. Cousteau neither individually or by agent maintained a regular business or a designated agent for service of process in Texas. There were letters sent between parties and one of plaintiff traveled to France. The court held on page 496 that even if defendant performs no physical act within the state, activities outside the state can provide adequate contacts if they have reasonably forseable consequences within the state. The court further stated that:

> "On the other hand, the Supreme Court in McGee demonstrated that a single contract by mail can be constitutionally sufficient, reducing the minimum

contacts requirements, in the words of one scholar, 'to a gossamer touch'."

In Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8CA 1969) plaintiff wrote to defendant and stated that it would be interested in representing defendant. Defendant responded. Negotiations were conducted by mail and by telephone. A representative of plaintiff travelled to Texas to view defendant's manufacturing facilities. As a result of the negotiations, plaintiff mailed from Minnesota to Texas an order and defendant mailed back an acceptance. Defendant never had an officer, employee or agent in Minnesota, and never maintained an office or any physical facility in Minnesota, never advertised directly in Minnesota, and never qualified to do business in Minnesota. This transaction was the only one between the parties. As the court states at page 369:

> "It (defendant) entered into a transaction having an impact on the commerce of that state. By doing so, it invoked the benefit and protection of Minnesota's law and could reasonably

have anticipated that its acts would have consequences in Minnesota. The fact that no agents of defendant entered the state is not controlling. . .

Wile the plaintiffs initiated negotiations with the defendant, the defendant actively and voluntarily participated in them thereafter... The cause of action clearly arose out of defendant's contacts with the Minnesota resident".

Personal jurisdiction can also be found based upon Great Western United Corp. v.Kidwell 577 F2d 1256 (5CA 1978) wherein the director of the Department of Finance of the State of Ohio was enforcing the Idaho statutes and had no connection with Texas, however, as the court stated at pages 1266,1267:

"Minimum contacts, however, need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects on the forum state will suffice...Very little purposeful activity is necessary to satisfy the minimum contacts requirements..." The impact of their acts was felt in the forum state, as it was intended to be."

DISCOVERY

Plaintiff has the burden of establishing personal jurisdiction and the effect of

dismissing the complaint for lack of sufficiency in the district court and staying discovery on jurisdictional issues meant that plaintiff would not be able to take discovery regarding personal jurisdiction matters to ascertain information which may be crucial to the determination of personal jurisdiction over the defendants prior to the district court's decision. Thus, plaintiff has the burden and was denied the means upon which he must rely in order to carry forward the burden since all of the information requested is secretively held by defendants.

Personal jurisdiction issues were decided by the district court and the court of appeals against plaintiff without permitting plaintiff to take discovery on such issues to reinforce his case since the information is not otherwise obtainable. The courts decided beforehand that no discovery information could be uncovered to gain personal jurisdiction and therefore discovery was not

permitted. Thus, a finding against plaintiff on personal jurisdiction without permitting discovery becomes a foregone conclusion. Such is contrary to our notions of fair play and substantial justice and violates due process.

The submission of interrogatories to ascertain information pertinent to a determination of personal jurisdiction is well established. River Plate Corp. v. Forestall L.T. & R. Co., 185 F.Supp. 832 (DC NY 1960), Commonwealth Oil Refining Co. v. Houndry Process Corp., 22 FRD 306 (DC Puerto Rico 1958), Tradesmen National Bank & Trust Co. v. Charlton Steam Shipping Co., 3 FRD 363 (DC Pal944), and Jiffy Lubricator Co., v. Alemite Co., 28 F.Supp. 385 (DC ND 1939). Moreover, dismissal without plaintiff being given ample opportunity to prove jurisdiction by discovery is not proper. Process Control Corp. v. Witherup Fabrication and Erection Inc., 439 F.Supp. 1284 (DC Ga 1977), Aamco Automatic Transmissions Inc. v. Tayloe 368 F.Supp. 1283 (DC Pa 1973).

Plaintiff has been unable to uncover any cases where it was held proper to deny to the party having the burden of establishing personal jurisdiction the right to take discovery to establish such personal jurisdiction.

These orders were included in the notice of appeal and were affirmed by the court of appeals.

THE SUFFICIENCY OF THE COMPLAINT

The amended complaint was dismissed under all of the 23 grounds urged by defendant under Rules 8,9,10 and 12 F.R.C.P. by the order of the district court of May 13, 1981. Appendix page A36. In response, a second amended complaint was filed. The final order of the district court of June 29, 1981 (page A-20) casts grave dispersons on the sufficiency of the second amended complaint and the court of appeals refused to consider this matter and inferred approval even though the order was appealed from in the notice of appeal. Such is totally contrary to the spirit of

Conley v. Gibson, 355 U.S. 41 (1957).

SUFFICIENCY OF THE AMENDED COMPLAINT UNDER RULE 23 F.R.C.P.

The amended complaint was also dismised in the order of the district court of May 13, 1981 (page A36) for failure to comply with Rule 23 F.R.C.P.

There is no requirement in Rule 23 that the complaint as originally filed must comply with the rule. Rule 23(c) specifically provides for motions and a determination as soon as practicable after the commencement of an action brought as a class action as to whether it can be maintained as a class action. There is no provision for dismissal of a complaint under Rule 23 and plaintiff has been unable to uncover any cases regarding such a dismissal. There are even times when a case not brought as a class action is permitted to be a class action at a later time. The action of the district court dismissing the amended complaint for lack of compliance with rule 23 is unprecedented. This was impliedly

affirmed by the court of appeals.

SUBJECT MATTER JURISDICTION

Defendant moved in the district court for dismissal for lack of subject matter jurisdiction claiming Eleventh Amendment immunity and judicial immunity. This issue was appealed and even though both parties requested a ruling on this issue, the court of appeals refused to rule on it.

Defendant strongly relies upon the fact that traditionally, the states have a compelling interest in the professions within their boundaries which gives them broad power to establish standards for licensing practitioners in regulating the practice of the professions. See Goldfarb v. Virginia State Bar, 421 US 773 (1975), and Reynolds v. Sims, 377 US 533 (1964) where the court quoting from Gomillion v. Lightfoot, 364 US 339, (1960) states:

> "It is also contended that principles of comity and federalism counsel judicial restraint in these cases.

> Regulation of the legal profession, to be sure, is largely the province of the states and the District of Columbia, but the federal courts nevertheless have a responsibility to listen when a litigant charges constitutional or federal statutory violations. As the Supreme Court has observed, '(W)hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Put another way, a state cannot, under the guise of regulating the legal profession, ignore constitutional rights. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). It is beyond question that bar examiners are subject to the requirements of the Due Process and Equal Protection Clauses of the U.S. Constitution in the conduct of their duties. See Schware v. Board of Examiners, 353 U.S. 232 (1957).

As the three-judge court said in Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F.Supp. 1392 (D.Hawaii 1971) at page 1395:

> "Defendants urge that this court is without jurisdiction to hear the case. Defendants' position is that

under Theard v. United States, 354 US 278... a federal district court may not sit in judgment on any state court orders relating to admission, discipline and disbarment of members of its bar, and that such orders may be reviewed only by the Supreme Court of the United States on certiorari to the state court. The same argument was presented to other three-judge courts, viz., Keenan v. Bd. of Law Examiners, 317 F.Supp. 1350 (E.D.N.C. 1970); Webster v. Wofford, 321 F.Supp. 1259 (N.D.Ga. 1970); Law Students Civil Rights Council, Inc., v. Wadmond, 299 F. Supp. 117 (S.D.NY 1969), aff'd 401 US 154...and Lipman v. Van Zant, 329 F.Supp. 391 (D.C.N.Miss. 1971). Each of these courts held that while Theard controls when questions of bar disciplinary proceedings not involving constitutional questions are concerned, it does not foreclose a three-judge district court from taking jurisdiction over a challange on constitutional grounds to state bar admissions requirements, whether prescribed by state statute, or by administrative or court rule. We agree."

Further as stated by Judge Friendly for the three-judge court in Law Students Civil Rights Research Council, Inc., v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) at 123,124:

"(when the) plaintiffs do not challange a state court's disposition of an individual case, but attack (on constitutional grounds)... the rules and regulations promulgated and administered by the (defendants), ...the alleged infringement of (the constitutional rights) of (the plaintiffs) cannot be dissipated by the processing of particular

> individuals' applications for admission to the bar...(This) make(s) appropriate our consideration of equitable relief even though the defendants would be immune from liability in damages for their administration of the challanged proceedures (citing cases). To hold otherwise would be to leave without a remedy a significant class of deprivations of federal rights under color of state law that Congress intended to redress under 42 USC 1983 and 28 USC 1343."

Defendant has claimed judicial immunity. It is undisputed that even a court, much less a state bar is not immune from civil rights statutes and that the federal courts have subject matter jurisdiction in such cases. See Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967 (1980) and the companion case Consumers Union v. Virginia State Bar, 100 S.Ct. 2980 , and the consolidated cases of Feldman v. Garner, and Hickey v. District of Columbia Court of Appeals, 661 F2d 1295 (D. Columbia 1981)(subsequently granted certiorari). Moreover, the federal courts have jurisdiction over bar examiners with regard to anti-trust violation,especially

when the practice of grading is chablanged, as it is in the present case. See Ronwin v. State Bar of Arizona, 663 F2d 914 (9CA 1981).

Defendant also claims Eleventh Amendment immunity to damages, contrary to the congressional intent under 42 USC 1985, that damages cannot be ascribed to them because they are an agency of the State of California. However, defendant has not shown that they receive any monies, or the extent of such monies compared with other sources of income. See Ronwin v. State Bar of Arizona, supra.

FORUM NON-CONVIENCE AND VENUE

Defendant has brought up the subject of transfer of venue under 28 USC 1404(a) for the first time on appeal. It should be noted that under Rule 12 FRCP defendant has waived venue, but has sought a transfer under forum non-convenience in that proportedly all their records are in California as are their witnesses. However, this matter should be able to be easily disposed of by summary

judgement based on answers to interrogatories propounded to defendant which defendant has thus far refused to answer.

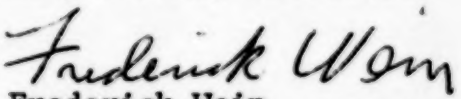
It is imperative that this court find forum non-convenience in favor of plaintiff. Considering the hostility plaintiff has encountered in the lower courts, it is almost a certainty that despite any finding in favor of personal jurisdiction for plaintiff, that the action would almost certainly be transferred thereby making any success by plaintiff a hollow victory.

The named plaintiff is currently a resident of Cook County Illinois and filed suit there. He has a substantial contact with the situs of venue. Unless evidence and circumstances strongly favor transfer, which in this case it does not, plaintiff's choice of forum should not be disturbed. Plaintiff's choice of forum is entitled to paramount consideration and the party seeking transfer bears a heavy burden.

CONCLUSION

Accordingly, it is believed that the present case fully meets the considerations governing review under Rule 17 and qualifies for the granting of a writ of Certiorari. The granting of the writ is respectfully requested.

Respectfully submitted,



Frederick Wein
Attorney for plaintiffs
600 Laramie Avenue
Wilmette, Illinois
60091
312/256-4971

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
No. 81-2708 Dated June 29, 1982

ORDER

This is an appeal from the district court's dismissal of the plaintiff's complaint because of lack of personal jurisdiction over the defendants. For the reasons stated below, we affirm that judgment.

I.

The plaintiff, Frederick A. Wein, is an Illinois attorney who in July 1980 took but failed the attorney's examination for admission to the State Bar of California.1/ On March 10, 1981, he filed this action in the Northern District of Illinois in an attempt to challenge the legality of the grading of that examination. Summons were served on the defendants in California by

1/ California makes available two methods for gaining admission to the practice of law: (1) an "attorney's examination," consisting primarily of essay questions, which may be taken by persons admitted to practice in other jurisdictions; and (2) a "general examination," consisting of both essay and Multistate Bar Examination sections, which is available to all qualified applicants.

a federal marshal. On May 13, the defendants moved to dismiss the action, arguing that the court lacked personal jurisdiction over them, and that the plaintiff's complaint was deficient in form. In response, the district court entered an order in which it: (1) dismissed the plaintiff's complaint for failure to comply with Fed. R. Civ.P. 8,9,10, and 23;2/ (2) reserved ruling on the defendants' jurisdictional objection, granting the plaintiff 20 days to file an amended complaint; and (3) stayed all discovery.3/

On May 29, the plaintiff filed an amended pleading. In it he alleged that the defendants maintain an artificially low passing rate for the attorney's

2/ The plaintiff attempted to frame his suit as a class action.

3/ Following the defendant's motion, the plaintiff had served them interrogatories inquiring into their relationship with the state of Illinois.

examination in order to restrict the number of attorneys practicing in California and to force persons to retake the examination. He urged that these allegations grounded causes of action under the federal antitrust laws, constitutional and statutory civil rights provisions, and state contract and tort law. In addition, he asserted that personal jurisdiction over the defendants was established under Fed.R.Civ.P. 4(e) and Illinois' long-arm statute, Ill. Rev. Stat. ch. 110, pars. 16,17, and 18.

On July 27, 1981, the court, renewing its consideration of the defendants' prior objection, entered an order dismissing the action for lack of personal jurisdiction. The plaintiff moved to amend the order under Fed. R. Civ. P. 59, requesting the court to transfer the case to an appropriate district under 28 U.S.C. § 1406(a). The court denied that motion. This appeal follows.

II.

The plaintiff raises three relevant claims before this court: (1) that the district court erred by dismissing this action for lack of personal jurisdiction over the defendants; (2) that the court erred by denying him an opportunity to pursue discovery concerning certain contacts between the defendants and the forum state; and (3) that the court abused its discretion by refusing to transfer this case to an appropriate district under 28 U.S.C. § 1406(a). 4/ We consider these in turn.

A. Personal Jurisdiction

The plaintiff argues that jurisdiction over the defendants was established under Illinois' long-arm statute, applicable to this federal suit by virtue of Fed. R. Civ. P. 4(e). 5/ Because that statute "reflect[s]

4/ Because this appeal is from a dismissal for lack of personal jurisdiction, the remaining issues raised in plaintiff's brief, e.g., subject matter jurisdiction, sufficiency of his claims, etc., are not properly before this court.

a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause," Fisons Limited v. United States, 458 F.2d 1241, 1250 (7th Cir.), cert. denied, 405 U.S. 1041 (1972), see Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 673 (1957), an evaluation of the plaintiff's attempt to utilize it in this context must be guided by the "due process" standards articulated by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.6/

5/ Although the plaintiff incorporated an antitrust claim in his complaint, at oral argument he expressly disavowed any reliance on the nationwide service provision of the Clayton Act, 15 U.S.C.§22, as a means for establishing personal jurisdiction over the defendants. Thus we limit our discussion to the state long-arm statute. See Advisory Committee Notes to Fed. R. Civ. P. 4(e) ("If the circumstances of a particular case satisfy the applicable Federal law . . . and the applicable State law. . . , the party seeking to make the service may proceed under the Federal or the State law, at his option.").

6/ Although the Supreme Court's major pronouncements in this area have all arisen in the context of assertions of power by state courts, i.e. McGee

The fundamental teaching in this area is that:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316. The focus for measuring those factors is the "relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

---

v. International Life Ins.Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court of California, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), we have applied an International Shoe analysis in both diversity cases, see e.g. Biltmoor Moving and Storage Co. v. Shell Oil Co., 606 F2d 202,206 (7th Cir. 1979); Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968), and federal question cases, see Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979),vacated on other grounds,451 U.S. 304 (1981); Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975) when a state long-arm statute was used as the means for effecting service of process. Recently, in his concurring opinion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982), Justice Powell suggested that such an approach is proper. See id. at 4558 (When a

Based on that relationship, we must determine "whether the 'quality and nature' of the defendant[s'] activity is such that it is 'reasonable' and'fair'" to require them to defend against the plaintiff's charges in the Northern District of Illinois. Kulko v. Superior Court of California, 436 U.S. 84,92 (1978). That determination necessarily depends upon the particular factual contours of this case. Id.

The plaintiff alleges a variety of "contacts" between the defendants and the state of Illinois. Essentially these fall into three categories: (1) the interaction of the defendants with Illinois residents who apply for admission to the California bar (this includes exchanges of information between the parties; submissions of forms, fees, and certifications of education by Illinois residents; notification of test

---

federal district court depends on the law of a state to establish personal jurisdiction, "its jurisdiction . . . normally would be subject to the same due process limitations as a state court.").

results; and provision of further application forms for Illinois residents who fail an examination); (2) the defendant's use in certain circumstances of the results of Multistate Bar Examinations taken in Illinois, 7/ and (3) the fact that there are members of the State Bar of California who reside in Illinois and who receive the association's publications there.8/

7/ The defendants allow applicants for the "general examination" to transfer their scores from recent MBE's taken in other jurisdictions rather than requiring them to retake the examination.

8/ Prior to oral argument, the plaintiff filed a "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery from Defendant or in the Alternative to Compel Discovery by Subpoena to Third Parties," in which he alleged two additional "contacts": (1) that California bar examiners attend a National Conference of Bar Examiner's seminar held in Chicago every two years; and (2) that the State Bar of California obtains information on the character and fitness of out-of-state applicants from the National Conference of Bar Examiners, which is headquartered in Chicago. The defendants did not respond to this motion. At argument, we indicated that we would consider this motion with the case. We now grant the motion to supplement to the extent that we consider the plaintiff's additional allegations. We deny the discovery requests.

An essential criterion for establishing the reasonableness of subjecting a non-resident defendant to litigation is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235 (1958); see Kulko v. Superior Court of California, 436 U.S. at 96; Lakeside Bridge & Steel v. Mountain State Construction, 597 F.2d 596, 600-01 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). The"contacts" alleged by the plaintiff do not satisfy this requirement. Although they illustrate some factual connection between the defendants and Illinois residents, they do not demonstrate any purposeful activity through which the defendants have availed themselves of the "benefits of conducting business in the forum."9/

This conclusion is consistant with that reached by the Fifth Circuit in Burstein v. State Bar of California, 659 F.2d 670 (5th Cir. 1981), withdrawn pending rehearing, 668 F.2d 795(1982), a case similar to ours, in which an individual who took but failed the California bar examination attempted to sue the State Bar of California in the Eastern District of Louisiana.10/ In Burstein the plaintiff focused on (1) the interaction of the defendant with Louisiana residents who

9/ We note in his reply brief the plaintiff, characterizing the defendants as a "state agency," also attempts to rely on more general contacts between the state of California and the state of Illinois as the basis for the court's jurisdiction. (Reply Brief at 2-3.) We reject this argument. The State Bar of California is a public corporation. Cal. Const. art. VI,§9; Cal. Bus. & Prof. Code §6001. (The Committee of Bar Examiners in turn is established by the board of the State Bar. Cal. Bus. & Prof. Code §6046.) The State Bar, as an entity is expressly amenable to suit. Cal. Bus. & Prof. Code §6001. Clearly that entity--not the state--is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has "minimum contacts" with the forum.

10/ Although the original panel opinion in this case has been withdrawn, we believe that the "minimum contacts" analysis of the facts of that case was sound.

apply for admission to the California bar and (2) the fact that some California bar members residen in Louisiana as the relevant "contacts." The court concluded that these were not sufficient "affiliating circumstances" to ground personal jurisdiction, noting:

> The State Bar of California does not avail itself of any Louisiana privileges or services. It does not solicit potential members in this or any state. Those who wish to sit for its examination take it upon themselves to apply to do so, and the State Bar, as a convenience to such persons, mails the necessary materials to the address given by these applicants. Similarly, the State Bar mails certain materials to members regardless of their place of residence rather than attempting to require that all its members maintain California mailing addresses.

Id. at 674 (quoting Burstein v. State Bar of California, 503 F. Supp. 227,229(E.D.La. 1980). This assessment is equally applicable to the case before us. To the extent that there is any relationship between the present defendants and the state of Illinois, it is generated by the "unilateral activity"

of persons who happen to be Illinois residents. Such activity cannot "satisfy the requirement of contact" constitutionally required to sustain personal jurisdiction. Hanson v. Denckla, 357 U.S. at 253; see Jadair, Inc. v. Walt Keeler Co.,No. 81-1380, slip op. at 6-7 (7th Cir. May 26, 1982).11/

11/ We recognize that Burstein did not involve an allegation that the defendant used results of MBE's administered in the forum state. Yet we do not find Wein's assertion to that effect sufficient to bridge the gap between the defendants and the State of Illinois. California's use of such examination results is contingent upon the unilateral act of an applicant in submitting his scores. Further, this practice has no effect on the applicant's standing or the defendant's activities in the forum. Finally, we note that Wein himself did not utilize this procedure nor are his substantive allegations in any way tied to the MBE.

We also do not find that plaintiffs belated allegations that California bar examiners attend meetings in Chicago and that the defendants have some dealings with the Chicago-based National Conference of Bar Examiners to be sufficient to satisfy this requirement. This type of sporadic and fortuitous interaction does not implicate the defendants, in any significant way, in activity that is subject to the "benefits and protections" of the laws of the forum state. See Turner v. Jack Tar Grand Bahama, Ltd., 353 F2d 954 (5th Cir. 1965).

The plaintiff resists this conclusion by relying on a number of cases in which personal jurisdiction has been successfully asserted over a nonresident defendant. E.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); Product Promotions, Inc. v. Cousteau, 495 F2d 483 (5th Cir. 1974); Fisons Limited v. United States, supra; Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F2d 365 (8th Cir. 1969). These cases, however, are inapposite. In each of them the defendant either exerted significant control on business in the forum state (Fisons), produced substantial effects on business in the forum (Great Western), or reasonably anticipated that a contract to which it was party would have direct consequences in the forum (Cousteau, Electro-Craft). Each of these defendants had some articulable stake in

the laws of the forum for enforcement or protection.

In the present case there is no such connection. The defendants have not purposely availed themselves of any privileges of the forum state. Moreover, that state has no significant interest in adjudicating this dispute. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Thus "basic considerations of fairness" disctate that the defendants could not "reasonably have anticipated being 'haled before [an Illinois] court.'" Kulko v. Superior Court of California, 436 U.S. at 97-98 (citation omitted); see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980); Burstein v. State Bar of California, 659 F.2d at 675. The limits of due process would have been transgressed had the court attempted to exert power over the defendants by means of Illinois' long-arm statute.

Thus, the court's rejection of this jurisdictional base was proper.

B. Discovery

Apart from his substantive jurisdictional argument, Wein also contends that the district court erred by dismissing his action without permitting him to pursue discovery concerning certain contacts between the defendants and the state of Illinois.12/

Although discovery concerning factual issues raised by a motion to dismiss for lack of personal jurisdiction may be appro-

12/ As explained by the district court, Wein sought information on:

> 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee[s] from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; [and] 4) all trips or communications sent to or received from Illinois for the past five years by any member of the California bar which [sic] was connected with the State Bar.

priate in certain cases, a district court is vested with broad discretion in controlling such inquires. Chrysler Corp. v. Feders Corp., 643 F2d 1229, 1240 (6th Cir), cert. denied, 102 S.Ct. 388 (1981); Budde v. Ling-Temco Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975). "A ruling by the trial court. . . denying discovery will not be cause for reversal unless an abuse of discretion is found." Chrysler Corp. v. Fedders Corp., 643 F2d at 1240 (citing H.L. Moore Drug. Exch., Inc. v. Smith, Kline, and French Laboratories, 384 F2d 97 (2d Cir. 1967)).

In this case the district court concluded that the information sought by Wein was "only tenuously related to [his] claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois." In effect the court found that the proposed discovery would not be useful to remedy the jurisdictional defect. In

light of our analysis of the question of personal jurisdiction, we find no abuse of discretion in the court's treatment of the plaintiff's request. Id.; see Burstein v. State Bar of California, 659 F2d at 675.

C. Transfer under 28 U.S.C. § 1406

The plaintiff's final argument is that the district court erred by dismissing this case rather than transferring it pursuant to 28 US.C.§1406(a) to a district "in which it could have been brought." Although section 1406(a) is "broad enough to authorize the transfer of [a case],. . . whether the court in which it was filed had personal jurisdiction over the defendants or not," Goldlawr, Inc. v. Heiman, 369 U.S. 463,466 (1962), such a transfer must be "in the interest of justice." A district court has broad discretion to decide if that criterion is met. Brown v. Grimm,624 F.2d 58 (7th Cir. 1980); De La Fuente v. I.C.C., 451 F. Supp. 867, 872 (N.D.Ill. 1978).

In this case the district court refused to authorize a transfer because: (1) the plaintiff did not affirmately show that he was barred from refiling his complaint in a proper forum; (2) the action was not substantially advanced prior to dismissal; and (3) the plaintiff never identified which district should receive the case. Based on these factors, the court acted within its discretion in denying the plaintiff's request. See Brown v. Grimm, supra; Lowery v. Estelle, 533 F.2d 265 (5th Cir. 1976) (dismissal does not bar refiling in proper forum).

III.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Ciruit

DATED August 5, 1982

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. According,

IT IS ORDERED that the aforesid petition for rehearing be, and the same is hereby, DENIED.

Unpublished Per Curiam Order

JUDGMENT-ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

June 29, 1982

No. 81-2708

U.S.D.C. 81-C-1312

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered on this date.

United States District Court
Northern District of Illinois
Eastern Division

Civil Action No. 81 C 1312

Dated July 23, 1981

MEMORANDUM AND ORDER

This cause is before the court on defendants' motion to dismiss plaintiff's second amended complaint. For the reasons hereinafter stated, the motion will be granted.

Background

Frederick A. Wein is an attorney licensed to practice law in the state of Illinois. In April, 1980, Wein filed an application for admission to the State Bar of California. As part of the application process, in July 1980, Wein took the attorneys examination required for admission.[1] In

[1] California, like many states, has two alternative methods of gaining admission to the practice of law. Persons who are admitted in other jurisdictions may qualify to take the "attorneys examination" which primarily consists of essay questions. Other qualified applicants take the general examination, which consists of both an essay and multistate section. The multistate section (MBE) is that approved by the National Conference of Bar Examiners, and is in use

December, 1980, Wein was notified that he had failed to pass the examination.[2] The notice also contained information on the requirements, applications and fees for re-taking the examination at a later time, as well as information concerning available review procedures.

Wein filed this action on March 10, 1981. The complaint listed eleven "causes of action," which were described in highly conclusory languages, i.e., "Count I. Breach of contract." On March 17, 1981, Wein filed an amended complaint which also contained similarly described "causes of action." On May 12, 1981, this court granted Defendants' motion to dismiss the amended complaint for failure to comply with Rule 8,9,10, and 23

---

in many states. Under the California rules, a qualified attorney applicant may chose to take either the general or the attorney examination.

2 Wein's application apparently gave his address as China Lake, California. Shortly after the examination, he requested his grades be mailed to his home in Wilmette, Illinois.

of the Federal Rules of Civil Procedure.[3] The original motions to dismiss raised several jurisdictional objections to the complaint. The court reserved ruling on these until such time as plaintiff filed a proper amended complaint. On may 29, 1981, plaintiff filed his second amended complaint. Although this complaint is seriously deficient in form, it appears adequate to resolve the jurisdictional objections at this time. Therefore, pursuant to the earlier order, the court has now considered the previously raised jurisdictional objections on the basis of the previously filed memoranda.

Allegations of the Complaint

Wein asserts that personal and subject matter jurisdiction exists by virtue of 15 U.S.C. §4; 28 U.S.C. §§1331, 1332, 1337,

3 The original and amended complaint contained some allegations which appeared to allege class action status would be proper. Not until the second amended complaint was filed was it clear that Wein was attempting to bring a class action.

1343, Federal Rule of Civil Procedure 4(e); Ill. Rev. Stat. Ch. 110, §§16, 17,18, and ancillary and pendant jurisdiction. The complaint contains causes of action briefly summarized as follows: Violation of the antitrust laws (Count 1); Civil Rights violations under 42 U.S.C. § 1983 and § 1985 (Count 2 and 3); Violation of plaintiff's right under the equal protection clause, the due process, and privilege and immunities clauses of the United States Constitution (Counts 4,5, and 6; Unjust enrichment, intentional infliction of emotional distress, misrepresentation, fraud, and breach of contract (Counts 7 through 12).

Despite this profusion of claims, Wein's contentions contain a common basis. Wein contends that the State Bar maintains an artificially low passing rate for the California's attorneys examination. He claims the State Bar uses this artificial method to restrict the numbers of attorneys practicing

in California, and to enrich itself through fees for persons compelled to retake the examination. He claims that although the Bar claims that there are 100 possible points on the essay portion of the exam, as a practical matter, it is impossible to achieve more than 70, the official passing score, on any single answer.

Personal Jurisdiction

Defendants contend that personal jurisdiction cannot constitutionally be asserted by this court. Wein contends that personal jurisdiction over these nonresident defendants is proper under the Illinois long-arm statute Ill. Rev.Stat. Ch. 110, 17, applicable by virtue of Rule 4(e) Fed.R.Civ.Pro.

Illinois courts have interpreted this statute to permit exercise of personal jurisdiction over nonresident defendants to the fullest extent permitted by the dur process clause. Nelson v. Miller, 11 Ill.2d 378 (1957). The question is therefore twofold.

First, plaintiff must present a prima facie case that this action is covered by the terms of the statute. Second, plaintiff must show that exercise of personal jurisdiction in this instance would not offend the due process clause of the United States Constitution.

Section 17(1) permits exercise of personal jurisdiction over nonresidents who perform certain actions within Illinois. Subsection (a) refers to actions arising from the "transactions of any business within the state." Wein contends that the acceptance of his application from Illinois, and the acceptance of fees from Illinois are sufficient contacts. It would be a strained interpretation that acceptance of an unsolicited application for admission, or the accompanying fee by mail would be considered the transaction of business. See Moity v. Louisiana State Bar Ass'n, 414 F.Supp. 176 (E.D.La. 1976). It is also a strained inter-

pretation to state that Wein's contention that the tests were unfairly graded is a "cause of action arising from" this "transaction of business," as required by Section 17(3). See Process Church of Final Judgment v. Sanders, 338 F.Supp. 1396 (N.D.Ill. 1972); Wiedemann v. Cunard Line Ltd., 63 Ill.App. 3d 1023, 20 Ill.Dec.723 (1st Dis., 1978).

The contention that Section 17(1)(b), commission of a tortious act, would support jurisdiction of this case is similarly flawed.

It is clear that the "contacts" upon which Wein relies bear little or no relation to the basis of his complaint. Wein's contentions revolve around the grading of the essay portion of the bar exam. Wein is not challenging the fairness of the multistate examination, nor is his complaint related to communications between the Bar and Illinois residents who happen to be members of the California Bar. California accepts applicants for admission from the entire United States,

and several foreign countries. The Bar imposes uniform fees upon all similarly situated applicants. Wein's contention that the mere acceptance of the application and accompanying fee allows assertion of jurisdiction over these defendants would result in the imposition of jurisdiction over these defendants in all these locations. Therefore, Wein's allegations do not meet the standard set forth in Section 17(3) for assertion of personal jurisdiction.

However, the primary question is whether assertion of personal jurisdiction over these defendants would be consistent with the due process clause. Assertion of personal jurisdiction over nonresident defendant requires that the nonresident have sufficient "minimum contacts" with the forum so that requiring the nonresident to appear and defend does not violate "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326

U.S. 310,316 (1954). The primary concern is whether the nonresident's conduct and connections with the forum are such that he should reasonably anticipate being hailed into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980); Kulko v. California Superior Court, 436 U.S. 84, 97-8 (1978); Hanson v. Deckla, 357 U.S. 235 (1958); Lakeside Bridge & Steel v. Mountain State Construction Co., 597 F.2d 596 (7th Cir., 1979).

The Supreme Court has noted "the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state" Hanson v. Deckla, supra at 253. In this action, it is undisputed that defendants neither performed any action in Illinois, or requested that plaintiffs take any action in Illinois. In Lakeside Bridge & Steel, supra, a Wisconsin corporation solicited and received a subcontract

for goods to be delivered to defendant in West Virginia. Defendant did not send any officers into Wisconsin for the contract, but corresponded with the Wisconsin plaintiff by mail and telephone. The Seventh Circuit Court of Appeals found performance of the contract by plaintiff, not defendant, within the forum was not sufficient particularly where the contract does not specify the place of performance. Lakeside, supra at 601.

In a very similar action, the District Court for the Eastern District of Louisiana found it lacked personal jurisdiction under the Louisiana long-arm statute. Burstein v. State Bar of California, 503 F.Supp. 227 (E.D.La. 1980). In that case a Lousiana resident sued defendants herein based on the alleged unfairness of the grading of the California Bar. The District Court found that only plaintiff's unilateral actions connected the complaint to the state of

Louisiana. Similarly, in this action, the unilateral choice of the resident plaintiff, Wein, does not justify assertion of jurisdiction over these nonresident defendants.

Wein contends it is inappropriate to dismiss his complaint without allowing him discovery to show additional contacts between defendants and the state of Illinois. The discovery Wein contends is necessary seeks information on 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; 4) all trips or communications sent to or received from Illinois for the past five years by any

member of the California Bar which was connected with the State Bar. We cannot agree that the answers to these interrogatories would strengthen Wein's claims against the State Bar. The Discovery requests are only tenuously related to Wein's claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois. Therefore, no additional discovery is needed.

Motion for Default.

On May 12, 1981, when the court dismissed Wein's first amended complaint, the court granted Wein twenty days to file a proper complaint. At the same time, in response to an inquiry from counsel for defendants, the court directed that no answer to such amended complaint need be filed until after the pending motions to dismiss were determined. Disregarding this instruction, Wein has filed a motion for default based on defendants' failure to answer the complaint. The motion ignores this court's

previous instructions to the parties, and shall be denied.

Other Grounds for Dismissal

Defendants motion raise several alternative objections and grounds for dismissal of this action. Because of this court's determination that personal jurisdiction is lacking, it is unnecessary and possibly improper to address the remaining issues. Therefore, we reject plaintiff's invitation to rule on all the grounds presented by defendants.

Conclusion

For the reasons stated, the motions of defendants Committee of Bar Examiners of the State of California, and the State Bar of California to dismiss this complaint for lack of personal jurisdiction shall be, and the same is hereby, granted.

EDWIN ROBSON
Senior Judge

Dated: J8ly 23, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81 C 1312
Dated September 15, 1981

MEMORANDUM AND ORDER

This cause is before the court on plaintiff's motion for reconsideration of the July 27, 1981, order dismissing the second amended complaint in this cause. For the reasons hereinafter stated, the motion will be denied.

The complaint was dismissed for lack of personal jurisdiction over these non-resident defendants. Plaintiff's motion for reconsideration complains of issues addressed in the original motion, or matters irrelevant to the determination of the question as outlined in the July 27, 1981, order. Plaintiff further contends the "interests of justice" require transfer rather than dismissal because the statute of limitations might run during a possible appeal.

Because plaintiff neither affirmately states the statute of limitations has run at this time, and because the action was not substantially advanced prior to dismissal, the court will decline to revise the order to transfer the action. Further, plaintiff does not identify which court in California should receive the case, merely stating it should be transferred to a court "where personal jurisdiction can be obtained over the defendant."

Therefore, for the reasons stated, the motion for reconsideration shall be and the same is hereby denied.

EDWIN ROBSON
Senior Judge

Dated: September 15, 1981

United States District Court
Northern District of Illinois
Eastern Division

Case No. 81 C 1312
Dated May 12, 1981

STATUS

STATUS HEARING HELD. Defendants' counsel granted leave to appear and represent defendant pursuant to GENERAL RULE 6(b). On motion of defendants, the amended complaint shall be and the same is hereby dismissed for failure to comply with RULES 8,9,10, and 23 of the FEDERAL RULES OF CIVIL PROCEDURE. PLAINTIFF IS DIRECTED to file a proper amended complaint within twenty (20) days, at which time the court will consider the jurisdictional arguments of defendants on the basis of briefs on file. Defendants given ten (10) days thereafter to file an answer or otherwise plead to the amended complaint STAY on discovery shall continue in effect. Status hearing and Plaintiff's motion to preserve evidence continued to June 23, 1981 at 11:00 A.M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 81 C 1312
Filed May 29, 1981

SECOND AMENDED COMPLAINT

The named plaintiff, for himself and all other members of the class hereinafter described now present this second amended complaint and allege as follows:

1. The jurisdiction of this court arises under the Constitution of the United States, in particular the provisions of the Privileges and Immunities clauses of Article 4 and Amendment 14, the Due Process clause of Amendment 5 as applied to the states under Amendment 14, the Equal Protection Clause of Amendment 14, and the laws of the United States and in particular 15 USC 4, 28 USC 1331, 28 USC 1332, 28 USC 1337, 28 USC 1343, as well as Rule 4(e) FRCP, Chapter 110, Illinois Revised Statutes sections 16, 17 and 18, and ancillar and pendant jurisdiction where appropriate. The matter in

controversey exceeds the sum of ten thousand dollars.

2. The named plaintiff is a resident of the Village of Wilmette, State of Illinois.

3. Defendant, State Bar of California, is a public corporation created by statute of the legislature of the State of California, California Business and Professional Code Section 6001, and has offices in the City of San Francisco, in the State of California. Defendant Committee of Bar Examiners is a committee of the State Bar of California established by the Board of Governors of the State Bar pursuant to statute section 6046 Cal. Bus. & Prof. Code, and has offices in the cities of San Francisco and Los Angeles, State of California.

4. This action is brought by plaintiff as a class action, on his own behalf and on behalf of others similarly situated under the provisions of Rules 23(a) and 23(b)(1)(A), 23(b)(1)(B), 23(b)(2) and 23(b)(3) FRCP for

injunctive relief, compensatory damages, punitive damages, threefold damages under 15 USC 15, attorney's fees under 15 USC 15, attorney's fees under 42 USC 1988, and costs.

5. The class so represented by plaintiff in this action of which plaintiff himself is a member consists of all persons having taken the July 1980 California Bar Examination and have not received a passing grade on said bar examination or any other California Bar examination subsequently given.

6. The exact number of members of the class, as hereinabove identified and described is not known but it is estimated at approximately four thousand members. The class is so numerous that joinder of individual members herein is impracticable.

7. There are common questions of law and fact in the action that relate to and affect the rights of each member of the class and the relief sought is common to the en-

tire class, namely the fraudulent grading of the essay portion of the bar exam, an excessively and unreasonably low passing rate on the examination in violation of the Sherman Act, an excessively and unreasonably low passing rate on the examination in order to unjustly derive substantial revenue from repeat takers of the exam at their expense and to their detriment, enticement and entrapment of members of the class to use proceedures to pass the examination which discriminate against said members and virtually insure that such members cannot pass the examination, all of the foregoing being in violation of plaintiff's constitutional and civil rights under Article 4, and Amendments 5 and 14 of the U.S. Constitution, 42 USC 1983, 42 USC 1985, 15 USC 1, as well as breach of contract, fraud, misrepresentation, unjust enrichment and intentional infliction of emotional distress.

8. The claim of plaintiff, who is a

representative of the class herein is typical of the claims of the class, in that all members of the class, including plaintiff, depend on a showing of acts and omissions of defendants giving rise to the right of plaintiffs to the relief sought herein. There is no conflict as to any individual named plaintiff and other members of the class with respect to this action, or with respect to the relief set forth herein.

9. The named plaintiff is a representative party of the class and being an attorney admitted in Illinois is able to and willing to fairly and adequately protect the interests of the class and will actively conduct and be responsible for the members case herein.

10. This action is properly maintained as a class action in that prosecution of seperate actions by individual members of the class would create a risk of varying adjudications with respect to individual

members of the class which would establish incompatable standards of conduct for the defendants herein of whom oppose the class.

11. This action is properly maintained as a class action in that the prosecution of seperate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

12. This action is properly maintained as a class action inasmuch as the defendants herein, all of whom oppose the class, have acted or refused to act, as hereinafter more specifically alleged, on grounds which are applicable to the class, and have reason for such conduct, make appropriate final injunctive relief as sought in this action.

13. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over all questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy in that plaintiff and members of the class all took the same California Bar Examination and were subjected to the same acts by defendants in connection with the administration of said examination as complained of herein.

14. Defendants are by statute of the State of California empowered as the sole agency to conduct bar examinations for determining by such examination which of the applicants for a particular examination are to be admitted to the State Bar of California and licensed to practice law in the State of California.

15. The bar examination is comprised

of a multistate multiple choice portion and an essay portion.

16. It is possible for an applicant to pass the bar examination in one of three ways hereinafter referred to as exam passing proceedures:

(a) An applicant can take both the multistate and essay portions at the same examination session, the scores of the two portions being weighted average of the two portions to determine the applicant's total score. Any applicant, including attorney applicants, can take this procedure and achieve a passing average on the whole exam while not achieving a passing grade on one of the multistate portion or the essay portion.

(b) An applicant, including attorney applicants, can take each of the two portions at different examination sessions, in which case the scores of the two portions are not averaged together and it is necessay for the

applicant to receive a passing average score on each of the multistate portion and the essay portion. This procedure is most often used by out of state applicants and out of state attorneys who have taken the multistate portion of the exam in another jurisdiction within 21 months of taking the California essay portion, in which case the multistate grade can be transferred to and accepted by the California Bar Examiners.

(c) If an applicant is an attorney practicing law four of the past six years in another jurisdiction, this out of state attorney applicant, at his or her election, can elect to take only the essay portion of the exam and must receive an average passing grade on the whole essay portion.

17. It is stated by the Committee of Bar Examiners that a passing grade on each of the essay questions is 70 out of a possible 100 and that the passing average grade on the essay portion is 70 out of a possible

100, the passing grade on the essay portion being the sum of all the grades achieved on all of the individual essay questions and divided by the number of essay questions.

18. Applicants from any state, upon presentation of a prescribed monetary fee and proper credentials including sponsorship by a member of the State Bar of California, can apply to take the California Bar Examination without regard to state citizenship.

19. Plaintiff, Frederick A. Wein, as well as other members of the class, in a good faith belief of fair treatment and equitable grading of the exam, and in detrimental reliance thereon, paid a prescribed monetary fee and presented proper credentials to the California Bar Examiners. Accordingly, plaintiff was admitted to take the July 1980 examination. The activity between the plaintiff and defendants, at the very least, comprising a contract, express or implied of a return promise by defendants that

plaintiffs can take the bar examination and will be equitably treated and the examination fairly graded, and that with such fair grading and equitable treatment, if all other matters are in order, that plaintiffs will be accorded the rights and privileges of all other applicants passing the bar examination, i.e. certification to the Supreme Court of California, and with that Court's approval, membership in the State Bar of California and a license to practice law in the State of California.

20. The named plaintiff, having practiced law four of the past six years in another jurisdiction, elected to take the essay portion only under procedure 16(c). Only out of state attorneys can take this "attorney's exam" but said attorneys can elect to take any of the other passing procedures, 16(a), 16(b) stated above. In all cases, all members of the class, regardless of test passing procedure chosed or used,

must take the essay portion of the examination.

21. Plaintiff and all members of the class took the bar examination in July,1980.

22. In accord with grading procedures, on information and belief, by use of model answers, grading sheets and instructions, and other matters not disclosed to applicants by the bar examiners, the essay portion of the subject bar examination was graded.

23. Plaintiff and members of the class did not achieve a passing grade according to the respective procedure used and accordingly did not sucessfully pass the examination and were refused admission to the State Bar of California and were refused a license to practice law in the State of California.

24. Plaintiff and other members of the class were informed by mail of such failure to pass the subject bar examination and were solicited by such mailing to pay a prescribed monetary fee and to apply to retake the next bar examination given in Feb-

ruary 1981. Such mailing consisted of instruction sheets for applying for the February 1981 examination and an application form to be filled out by applicants. Such notice, on information and belief, intentionally caused emotional distriess to various members of the class.

25. Plaintiff and members of the class, to their detriment, relied upon good faith, fair dealing and equitable grading of the essay portion of the exam which are elements of any contract. However, have conducted the examination such that singly or in combination, it is virtually impossible, if in fact impossible for an applicant to achieve an average passing grade of 70 out of a purported possible grade of 100 in that it is virtually impossible, if in fact impossible to achieve a passing grade of 70 out of a purported possible grade of 100 on any individual essay question, or that discriminatory passing procedures are established to

the detriment of out of state applicants and such out of state applicants are enticed and entrapped into using such passing procedures 16(b) and 16(c) requiring a passing grade on the essay portion such that the achieving of such a passing grade being virtually impossible to achieve, with the artificially low grades on the essay portion reducing the average grade on the whole examination according to procedure 16(a) affecting California residents, such that defendant engages in fraudulent, dishonest, and improper grading of the essay portion of the examination in breach of contract, by fraud, misrepresentation, deception, and false promise in order to restrict and keep down the numbers of applicants passing the examination in violation of 15 USC 1, 42 USC 1983, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, 42 USC 1985, intentional infliction of emotional distress,

and unjust enrichment.

26. That defendants by means of excessively and unreasonably low passing rate on the examination, typically less than 50% (52% for the July 1980 examination, 34% for the February 1980 examination, by way of example and not be way of limitation) achieved by means stated in paragraph No. 25 above which is expressly incorporated by reference herein, conducts the bar examination in a manner designed to unreasonably restrict and limit the number of applicants admitted to the State Bar of California in order to control the number of attorneys practicing law in the State of California, and singly or in concert with others, unreasonably restrict competition with attorneys previously admitted and practicing law in the State of California affecting interstate commerce in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of

contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

28. That defendants conduct the examination by means of excessively and unreasonably low passing rate on the examination achieved by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, to produce the excessively and unreasonably low passing rate in a capricious and arbitrary manner independent of any rational connection with plaintiff's fitness or capacity to practice law in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

29. That the establishing of passing procedures for taking the examinationby out of state attorneys which discriminate against

said out of state attorneys in favor of California residents causing excessively and unreasonably low passing rates chieved by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, to entice and entrap said out of state attorneys to use said discriminatory procedures 16(b) and 16(c) which by intentional deceit, fraud, false promise and misrepresentation by defendants, mislead such out of state attorneys knowing of such attorneys reliance upon fair marking of the examination and equitable treatment by defendant, and lack of knowledge of such out of state attorneys to the detrimental effects of such proceedures in violation of 42 USC 1983, 42 USC 1985, 15 USC 1, Article 5 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, unjust enrichment, and intentional infliction of emotional distress.

30. That defendants knowingly enticed

and entrapped out of state attorneys to take passing procedures 16(b) and 16(c) which are virtually impossible, if in fact impossible, to pass the bar examination because it is virtually impossible, if in fact impossible, to pass the essay portion of the examination by means stated in paragraph No. 25 hereinabove which is expressly incorporated by reference herein, by intentional deceit, fraud, false promise, and misrepresentation by defendants, thereby putting such out of state attorneys at an unfair disadvantage with respect to residents of the State of California in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constitution, as well as breach of contract, fraud, misrepresentation, intentional infliction of emotional distress, and unjust enrichment.

31. That the alternate passing procedures primarily available to out of state attorneys, i.e. procedures 16(b), 16(c),

which are virtually impossible, if in fact impossible to pass, are designed to discourage and in fact do discourage immigration of out of state attorneys to the State of California in order to restrict competition of such out of state attorneys with attorneys previously admitted within the State of California and practicing law in the State of California affecting interstate commerce in violation of 15 USC 1, 42 USC 1983, 42 USC 1985, Article 4 and Amendments 5 and 14 of the U.S. Constition, as well as breach of contract, faud, misrepresentation, unjust enrichment, and intentional infliction of emotional distress.

COUNT No. 1

Defendants have violated anti-trust laws 15 USC 1 (Sherman Act) as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 2

Defendants have deprived plaintiffs

of civil rights under 42 USC 1983 as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 3

Defendants have deprived plaintiffs of civil rights under 42 USC 1985 as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 4

Defendants have deprived plaintiffs of civil rights under the Equal Protection Clause of Amendment 14 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 5

Defendants have deprived plaintiffs of rights in violation of the Due Process Caluse of Amendment 5 as applied to the states under Amendment 14 of the U.S Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 6

Defendants have deprived plaintiffs of rights in violation of the Privileges and Immunities Clause of Amendment 14 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 7

Defendants have deprived plaintiffs of rights in violation of the Privileges and Immunities of Article 4 of the U.S. Constitution as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 8

Defendants have enriched themselves unjustly at the expense of plaintiffs and to plaintiff's detriment as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 9

Defendants have intentionally caused

members of the class emotional distress as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 10

Defendants have misrepresented facts to plaintiffs upon which plaintiffs relied to their detriment as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 11

Defendants have perpetrated a fraud upon plaintiffs as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

COUNT No. 12

Defendants have breached a contract with plaintiffs as shown in paragraph Nos. 1-31 which are expressly incorporated by reference herein.

WHEREFORE, plaintiff prays, for himself and all other members of the class:

1. That a revised passing grade cri-

teria of 70 percent of a reasonably achievable 100 percent grade be established and determined for the essay portion of the July 1980 California Bar Examination and that it be adjudicated, decreed and ordered that plaintiffs now having passed the essay portion under the revised grading criteria under all test passing procedures established for the examination, that all such applicants be accorded all rights and privileges of all other successful applicants including certification to the Supreme Court of California for admission to the State Bar of California and a license to practice law in the State of California.

2. Unspecified compensatory damages.

3. Unspecified punitive damates.

4. Threefold damages under 15 USC 15.

5. That defendants be permanently enjoined from conducting future bar examinations in the manner complained of herein.

6. Attorney's fees under 15 USC 15

7. Attorneys fees under 42 USC 1988.

8. Costs.

9. Other relief which the court deems just.

Respectfully submitted

Frederick A. Wein
Attorney for plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action 81 C 1312
Filed October 21, 1981

NOTICE OF APPEAL

Notice is hereby given that Frederick A. Wein, individually and as a representative of a class of others similarly situated, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the following orders entered in this civil action:

1. The order entered July 27, 1981.

2. The order entered September 21, 1981 refusing amendment of the order of July 27, 1981.

3. The order entered May 13, 1981 which was denied reconsideration by the order entered July 27, 1981, which in turn was denied amendment by the order entered September 21, 1981.

Respectfully Submitted
Frederick A. Wein

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2708
filed June 3, 1982

MOTION TO SUPPLEMENT THE RECORD ON APPEAL, and MOTION TO COMPEL DISCOVERY FROM DEFENDANT OR IN THE ALTERNATIVE TO COMPEL DISCOVERY BY SUBPOENA TO THIRD PARTIES, with MEMORANDUM IN SUPPORT THEREOF

Named plaintiff hereby moves to be permitted to supplement the record on appeal and, if necessary, that defendant be compelled to provide highly relevant information or that a subpoena issue to third parties for the required information for the reasons shown herein.

The present case was dismissed for lack of in personam jurisdiction in the district court wherein plaintiff was denied all discovery related to jurisdictional issues. See plaintiff's Motion for Reconsideration, filed May 22, 1981, docket No. 32. The refusal of the district court to permit discovery related to jurisdictional matters is, inter alia, brought to this Court

on appeal. See Brief for Appellant, pages 27-29, and page 32, enumerated item No. 4.

Subsequently, events have transpired which further illustrate that defendant has in fact engaged in systematic and continuous transactions of business within the forum state of Illinois which plaintiff, deprived of previous discovery, was unaware of until just recently. It is these systematic and continous transactions of business which plaintiff now brings to the attention of the Court.

Defendant will claim, as in their letter of response dated May 20, 1982 submitted herewith ahd discussed hereinafter, that plaintiff is "a little bit late". However, such lateness is due to defedant's previous objections to reasonable discovery, and plaintiff has only recently become aware of such transactions of business by fortuitous events, the timing of which were not within plaintiff's control. Accordingly,

any purported lateness is excusable and without fault to plaintiff and such purported lateness should not be permitted to be used by defendant as a new excuse to deprive the Court of information it requires in order to reach a just decision.

THE PRESENCE OF BAR EXAMINERS IN ILLINOIS

The first substantial and continous contact discussed is the presence of bar examiners from the State Bar of California within the forum state of Illinois.

In an article appearing in the Chicago Daily Law Bulletin of Monday, May 3, 1982 reported a seminar of bar examiners held April 29 and 30, 1982 at the Westin Hotel (formerly the Continental Plaza Hotel) at 909 North Michigan Avenue, Chicago, Illinois, by the National Conference of Bar Examiners (NCBE) headquartered at 333 North Michigan Avenue, Chicago, Illinois. A copy of said article is submitted as exhibit "A". The newspaper being one of general circulation

in the community, the Court is hereby moved to take judicial notice of said article under Rule 201, Federal Rules of Evidence.

Telephone inquiry to NCBF revealed that there were two or three bar examiners present from the State Bar of California and that this seminar for new bar examiners is held every two years. Understandably, NCBE refuses to document this or provide any further information unless by way of subpoena.

Accordingly, plaintiff wrote defendant on May 17, 1982, requesting that they voluntarily provide such information, said letter being submitted herewith as exhibit "B". Defendant's reply by letter of May 20, 1982, submitted herewith as exhibit "C" was a refusal to provide the requested information and is consistant with defendant's previous resistance to all discovery.

Exhibit "C" is significant for two reasons. Firstly, the thrust of plaintiff's letter requesting documentation that bar

examiners of the State Bar of California have attended the latest seminar and previous seminars given every two years is not denied and is in fact, by reference to the Wailes affidavit affirmed. Accordingly, exhibit "C" stands as an admission by defendants against interest and is admissible as evidence by the Court.

Secondly, exhibit "C" demonstrates that the previously impeached Wailes affidavit is a cleverly written document and intentionally incomplete, which has the effect of misleading the Court into believing that defendant has no contacts with the forum State of Illinois much less minimum contacts and that in so doing, the Wailes affidavit effectively misrepresented the issue before the Court and by its lack of candor is perjurious.

The information requested by plaintiff in exhibit "B" isin the posession of defendant but defendant refuses to divulge said

information. If they have such clean hands, why should they not provide the information? Their refusal to divulge invites the Court to resort to a spoliation inference, ergo, that the information which they refuse to divulge is detrimental to defendant's cause, i.e. that bar examiners from the State Bar of California did attend the seminar held in Chicago, Illinois, April 29 and 30, 1982, and that bar examiners of defendant have systematically and continuously attended similar seminars previously given every two years.

Should the Court choose not to make this inference, it will be necessary for plaintiff to provide the proof and therefore plaintiff appeals to the Court to help acquire said proof. In such an event, plaintiff hereby moves the Court to compel disclosure of such information and other relevant closely connected information. If the Court decides not to compel discovery from defendant,

then plaintiff, in the alternative, moves the Court to issue a subpoena directed to the National Conference of Bar Examiners and to the Hotel Westin to ascertain the presence and quantity of bar examiners of defendant within the forum state of Illinois for defendant's business purposes.

This Court is empowered to issue such a subpoena under 28 USC 1651 and under authority of AMERICAN LITHOGRAPHIC CO. v. WERCKMEISTER, 221 US 603 (1911) and BETHLEHEM SHIPBUILDING CORP. v. NLRB, 120 F2d 126 (1CA 1941). Plaintiff moves for issuance of a subpoena to NCBE and the Westin Hotel as a last resort. Defendant posesses the required information and refuses to be forthright. Would it be more reasonable to compel defendant to provide such information rather than place a burden on innocent third parties?

DEFENDANT SYSTEMATICALLY AND CONTINUOUSLY TRANSACTS BUSINESS WITHIN ILLINOIS

Plaintiff, while reading the case of STRAUSS V. ALABAMA STATE BAR , 520 F.Supp.

173 (DC ND Alabama, 1981) wherein the residency requirement of the Alabama State Bar was invalidated, plaintiff first learned that it is a standard practice of bar associations to use the National Conference of Bar Examiners, headquartered at 333 North Michigan Avenue, Chicago, Illinois, as an investigative agency in order to obtain information on the character and fitness of out-of-state residents. Defendant has stated that 159 Illinois residents applied for and sat for the bar examination in issue, i.e. July 1980 and this is from Illinois alone, leaving applicants from 48 other states unaccounted for. It is hypothesized that the total number of out-of-state applicants could easily be over one thousand since over 8,000 applicants took the exam in issue.

While reading this case, it occured to plaintiff that defendant quite probably engages in this practice presently and in the past of engaging NCBE to investigate

applicants and pays NCBE a monetary fee of amount unknown to plaintiff. Accordingly, by letter of May 21, 1982, submitted herewith as exhibit "D", plaintiff requested, as he did in the letter of May 17, 1982, that defendant voluntarily provide such information. Defendant has refused plaintiff even the courtesy of replying to the letter of May 21, 1982. Plaintiff attempted by numerous telephone calls to Mr. Robert Sweet, attorney for defendant, on June 1, 1982, to ascertain whether a reply to the letter of May 21, 1982 was forthcoming. However, plaintiff was unable to either speak directly with Mr. Sweet or receive an answer by leaving a message with his secretary for Mr. Sweet to leave a return message with her.

Thus, we have a second refusal to provide information. The systematic and continuous use of the paid for services of NCBE would be another substantial, continuous and systematic contact of defendant with the

forum State of Illinois. This issue was known to defendant and evaded by the Wailes affidavit, further discrediting the affidavit. Accordingly, all issues and arguments presented herein by plaintiff should be viewed in light of such discreditation, i.e. the refusal to divulge, the admission by lack of defendant's denial, and the spoliation inference. Similarly, this Court has the power to issue a subpoena to the National Conference of Bar Examiners to determine such information and facts as an alternative to compelling discovery from defendants.

CONCLUSION

Plaintiff has a right to due process to prove his case and was denied this right in the district court. Even in the granting of the discovery requested herein, plaintiff's discovery is severely limited relative to that which should have been permitted in the district court under Rule 26 FRCP. Accordingly, this court should make all inferences

presented most favorable to plaintiff, and in the alternative, permit plaintiff to take discovery by compelling discovery from either defendant or from third parties which are readily available within the geographic limits of the City of Chicago, Illinois, and certainly within the forum State of Illinois.

Respectively submitted

Frederick A. Wein
Attorney for plaintiffs-
Appellants

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2708
Filed February 18, 1982

(PORTION OF) REPLY BRIEF

PERSONAL JURISDICTION-TRADITIONAL MINIMUM CONTACTS

The district court refused to permit discovery with regard to jurisdictional issues and plaintiff was unable to determine the numbers of members of the State Bar of California having mailing addresses in Illinois. However, defendant, at page 18 of their brief, indicates that 413 members have mailing addresses within Illinois. These members receive the Bar Journal published by defendants and are solicited within the forum State of Illinois by advertisements in that Bar Journal. Just one example of such a solicitation is a solicitation to travel to Montery California for a State Bar Convention. One such advertisement appears in the California Bar Journal of May 1980 at pages 217-221 and solicits attendance

lodging and recreation of bar members within the State of California and for defendant's direct benefit. Undoubtedly, such a solicitation appears every year. A copy of this solicitation is included in the supplemental appendix submitted herewith. Plaintiff hereby moves the court to take judicial notice of such afforementioned advertisement under Rule 201, Federal Rules of Evidence. Such is an active solicitation and not merely a "PASSIVE UNILATERAL" activity.

Such an express solicitation by defendants within the forum State of Illinois provides a substantial contact and, continuous and systematic transaction of business which in itself provides a basis for personal jurisdiction. See Wilkerson v. Fortuna Corporation, 554 F2d 745, (5CA 1977). This solicitation along with other substantial and continuous contacts by defendants as previously shown with the forum State of Illinois provide substantial and continuous

contacts with Illinois to enable assertion of personal jurisdiction over defendants even though the activity is not directly connected with the bar examination complained of. See Perkins v. Benquet Consolidated Mining Co., 342 US 437 (1952), Fissons Limited v. U.S., 458 F2d 1241 (7CA 1972), and BraBand v. Beech Aircraft Corp., 51 Il App.3d 296, 367 NE2d 118 (1972), aff'd 72 Il 2d 548.

Defendant claims various subject matter immunities based upon its purportedly being an agency of the State of California. However, defendant also claims lack of personal jurisdiction over them because they purportedly do no business in the State of Illinois, have no agents here, and have no offices here. This is not true.

As shown hereinabove, defendants themselves do business within the forum State of Illinois. Moreover, the State of California maintains offices in the City of Chicago,

State of Illinois. The court's attention is directed to page 190 of the Chicago alphabetical telephone directory (white pages) published by Illinois Bell Telephone Corp., dated July 1, 1981, a copy of page 190 being included in the supplemental appendix submitted herewith. This directory shows, as indicated in red, that the California State Board of Equalization, an agency of the State of California, has offices at 150 North Wacker Drive, Chicago, Illinois, telephone number 782-7253. Moreover the California State Franchise Tax Board, an agency of the State of California, also has offices at 150 North Wacker Drive, Chicago, Illinois, telephone number 853-6300. In fact, the listing of the Franchise Tax Board is in enlarged typeface and constitutes an advertisement in the directory and in the State of Illinois. Plaintiff hereby moves the court to take judicial notice under Rule 201 Federal Rules of Evidence, of these listings

at page 190 in the July 1981 Chicago Telephone directory and of the existance of said offices within the forum state of Illinois.

A telephone call to these offices reveals that the Board of Equilization handles sales tax matters in connection with the State of California and the Francise Tax Board deals with corporations including corporate tax matters as well as individual income tax matters for the State of California. It seems evident that the State of California derives substantial and continuous revenue from within the State of Illinois through said existing offices in order to justify maintainance of such offices in Illinois.

Defendant claims to be a state agency to cloak it from subject matter jurisdiction. It them must also be a state agency for purposes of personal jurisdiction under the Illinois long-arm statute. Defendant cannot have it both ways. Thus, these offices

of the State of California alone constitute substantial and continous contacts by the State of California and the agencies thereof including defendant with the State of Illinois to exert personal jurisdiction over defendant. See Hutter Northern Trust v. Door County Chamber of Commerce, 403 F2d 481 (7CA 1968).

Under Perkins v. Benquet Consolidated Mining, Co., (supra), Fissons Limited v. U.S. (supra), and Braband v. Beech Aircraft Corp., (supra) it is permissible to exercise personal jurisdiction over defendants even though the cause of action arose from activities entirely distinct from its conduct within the state. Here it is shown that the State of California, of which defendant asserts it is an agency of, conducts systematic and continuous transaction of business within Illinois. Such contacts of the State of California therefore are also contacts by defendants within the forum State of Illinois. . . . . .

SUBJECT MATTER JURISDICTION

Defendant strongly relies upon the fact that traditionally, the states have a compelling interest in the professions within their boundaries which gives them broad power to establish standards for licensing practitioners in regulating the practice of the professions. See Goldbarb v. Virginia State Bar, 421 US 773 (1975). However, as the U.S. Supreme Court has stated in Reynolds v. Sims, 377 US 533 (1964) quoting from Gomillion v. Lightfoot,364 US 339 (1960):

(Citation omitted)

Put another way, a state cannot, under the guise of regulating the legal profession, ignore constitutional rights. N.A.A.C.P. v. Bu-ton,371 US 415 (1963). It is beyond question that bar examiners are subject to the requirements of the Due Process and Equal Protection Clauses of the U.S. Constitution in the conduct of their duties. See Schware v. Board of Examiners,353 US 232 (1957).

As the three-judge court said in Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F.Supp. 1392 (D.Hawaii 1971) at 1395:

> (Citation omitted citing Keenan v. Bd. of Law Examiners, 317 F.Supp 1350 (E.D.N.C. 1970); Webster v. Wofford 321 F.Supp 1259 (N.D.Ga.1970); Law Students Civil Rights Council, Inc. v. Wadmond, 299 F.Supp.117(S.D.NY 1969), aff'd 401 US 154...and Lipman v. Van Zant, 329 F.Supp. 391 (C.D.N.Miss. 1971) all three-judge courts.)
>
> . . . It is undisiputed that even a court, much less a state bar is not immune from civil rights statutes and that the federal courts have subject matter jurisdiction in such cases. See Supreme Court of Virginia v. Consumers Union,100 S.Ct. 1967 (1980) and the companion case of Consumers Union v. Virginia State Bar, 100 S.Ct. 2980, and the consolidated cases of Feldman v. Garner, and Hickey v. District of Columbia Court of Appeals,661 F2d 1295 (D.Columbia 1981). Moreover, the federal courts have jurisdiction over bar examiners with regard

to anti-trust violation, especially when the practice of grading is challanged, as it is in the present case. See Ronwin v. State Bar of Arizona, 663 F2d 914(9CA 1981).

Defendant claims Eleventh Amendment immunity to damages, contrary to the congressional intent under 42 USC 1985, that damages cannot be ascribed to them because they are an agency of the State of California. However, defendant has not shown that they receive any monies from the State of California treasury or if they receive such monies, the extent of such monies in comparison with other income sources. See Ronwin v. State Bar of Arizona, supra.....

PERSONAL JURISDICTION NATIONWIDE

. . . . Nationwide jurisdiction for federal courts in federal question jurisdiction is well stated in Federal Trade Commission v. Jim Walter Corporation, 651 F2d 251 (5CA 1981) at 256 as follows:

"Subject only to the regulation of

> Congress, each federal court exercises the "Judicial Power of the United States," not a judicial power constitutionally limited by boundaries of a particular district. (citation omitted). Because the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, "the sovereign that has created the court", (citation omitted). JWC, a resident United States Corporation, necessarily has sufficient contacts with the United States to satisfy the requirements of due process. See e.g. Fitzsimmons v. Barton, 589 F2d 330 (7th Cir. 1979)."

In accord is Driver v. Helms, 577 F2d 147 (1CA 1978) wherein the court stated at 156:

> "The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries. The circumscription of state court jurisdiction is a product of boundaries of state's sovereignty. The United States, however, whose court is here asserting jurisdiction does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries."

The court further states in footnote 25, page 156:

> "We see no reason why the United States does not have the same power over defendants found within its borders. Even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States."

. . . .Thus,which manner of service under Rule 4 FRCP is used, has no effect on jurisdiction. As previously stated, defendant confuses process with jurisdiction. In accord, Terry v. Raymond Intern Inc. 658 F2d 398 (5CA 1981) at 401 wherein the court states:

> "Our analysis of personal jurisdiction is based on a combination of two elements, amenability to jurisdiction and service of process. By amenability we refer to the substantive reach of a forum's jurisdiction. Service of process is the physical means by which jurisdiction is asserted. These elements are related but distinct. Both service of process and amenability must be present to authorize a district court to adjudicate the rights of the parties. Because amenability has both state law and federal constitutional significance, personal jurisdiction of the district court over Manitowoc must be determined by the use of three tests: (1) assertion of jurisdiction by the law of the forum, (2) conformity of the law with the Constitution, and

(3) authority for the means of service of process. Under the Federal Rules of Civil Procedure, either federal or state methods of service are authorized. See FRCP 4. If the law of the forum does not authorize the means by which service on a party has been accomplished the court lacks personal jurisdiction over the party even though the party is amenable to the court's jurisdiction.

In a diversity case, the amenability of a nonresident party is determined under a two-part test. First the long-arm statute of the forum state must assert jurisdiction over the defendant for the cause of action at issue in the suit. This question is governed by state law (citations omitted). Second, the exercise of personal jurisdiction over the defendant must be consistant with the due process clause of the fourteenth amendment. This inquiry proceeds under federal law, and consists of deciding whether the defendant has minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" International Shoe Co. v. Washington, 326 US 310...; see also Product Promotions Inc. v. Cousteau, 495 F2d 483...

The contours of amenability in non-diversity cases are more fluid. Federal statutes have effect throughout the United States, and thus assertion of "federal long-arm jurisdiction" arises only in the context of jurisdiction over nonresident aliens or the extraterritorial assertion of American law (citations omitted)."

The court concludes on page 402:

"In a case brought under both diversity and federal case juris-

diction, the defendant's amenability to process under state law, which would be critical in a pure diversity based action, is irrelevant."

In accord is Diver v. Helms, 577 F2d 147 (1CA 1978)wherein the court states at 155:

"The statute addresses only the mechanics of service of process and does not address the exercise of personal jurisdiction. Obviously, it is one thing for an individual to be served with process extraterritorily (sic), but quite another for that individual to be subject to the personal jurisdiction of a court in compliance with the Constitutional requirements of due process.

It is true that jurisdiction over a person and service are distinguishable but they are closely related. (S)ervice of process is the vehicle by which the court may obtain jurisdiction."

Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-748

IN THE

Supreme Court of the United States

October Term 1982

FREDERICK A. WEIN,
INDIVIDUALLY AND AS A REPRESENTATIVE OF A
CLASS OF OTHERS SIMILARLY SITUATED,
Petitioner,

vs.

COMMITTEE OF BAR EXAMINERS OF
THE STATE BAR OF CALIFORNIA
AND THE STATE BAR OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HERBERT M. ROSENTHAL
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

ROBERT M. SWEET
1230 West Third Street
Los Angeles, California 90017
(213) 482-8220

Attorneys for Respondent

QUESTIONS PRESENTED*

1. Whether in the instant action by one who failed the California bar examination and then moved to Illinois,

---

* The district court dismissed petitioner's second amended complaint solely on the basis of lack of personal jurisdiction, and for that reason did not reach the other grounds asserted in respondent's motion to dismiss (i.e., lack of subject matter jurisdiction, Eleventh Amendment damages immunity, quasi-judicial damages immunity, failure to state a claim, and noncompliance with Federal Rules of Civil Procedure 8, 9, 10 and 23). It is submitted that the Court of Appeals properly concluded that because the appeal was from a dismissal for lack of personal jurisdiction, the remaining issues addressed in petitioner's briefs on appeal (being the other grounds originally asserted for dismissal) were not properly before the court. Indeed, if the lower court lacked personal jurisdiction, any judgment on the remaining issues would be void. See Worldwide Volkswagon v. Woodson, 444 U.S. 286, 291, 100 S.Ct. 559, 564 (1980), citing Pennoyer v. Neff, 95 U.S. 114, 132-133, 24 L.Ed. 565 (1878). It is respectfully submitted that personal jurisdiction and the subsidiary discovery issue related thereto are the only issues properly before this Court and that therefore this Court as well should decline petitioner's invitation to address the many other issues raised in his petition.

the district court for the Northern District of Illinois (Eastern Division) and the Court of Appeals for the Seventh Circuit correctly determined that the applicable standard to utilize in determining whether personal jurisdiction had been obtained over respondent State Bar of California and its component Committee of Bar Examiners as to any or all of petitioner's alleged claims for relief (i.e., federal civil rights and antitrust, and state law diversity claims) was the minimum-contacts-with-the-forum-state standard of International Shoe and its progeny, since petitioner elected to effect service of process solely under the second sentence of Fed.R.Civ.P. 4(e), utilizing the Illinois long arm statute, and disclaimed any intent to utilize a federal statute providing for nationwide service of process as to antitrust claims (i.e. 15 U.S.C. § 22).

2. Whether the district court and the Court of Appeals correctly applied such minimum contacts standard in determining that respondent State Bar of California had insufficient contacts with Illinois to justify the assertion of personal jurisdiction consistent with "due process" concepts inherent in the minimum contacts formulation.

3. Whether the Court of Appeals correctly determined that the district court had not abused its discretion in concluding that before it had reached its decision concerning the lack of personal jurisdiction, petitioner had been afforded adequate opportunity to engage in discovery relevant to the issue of personal jurisdiction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
I. COUNTERSTATEMENT OF THE CASE	2
II. REASONS WHY THE WRIT SHOULD BE DENIED	19
A. Since Petitioner Expressly Elected Not To Utilize A Federal Statute Providing For Nationwide Service Of Process As To His One Antitrust Claim, Personal Jurisdiction As To All Petitioner's Claims (i.e. Diversity And Nondiversity) Is Limited To That Which May Be Obtained Under The Illinois Long Arm Statute Used By Petitioner	19
B. The Courts Below Properly Dismissed The Complaint For Lack Of Personal Jurisdiction. The Undisputed Facts Demonstrate That There Are No "Minimum Contacts" With Illinois Which Would Make It Fair And Reasonable To Require Respondent To Conduct Its Defense In That State	32

1. The presence of offices of California tax agencies in Chicago is not a contact of the State Bar 33

2. Attendance at occasional meetings and seminars in Chicago is not a business contact 35

3. The California bar examination is not given in Illinois or in any state other than California 37

4. The submission of a bill of costs is not a contact 40

5. The majority of the contacts relied upon by petitioner are simply unilateral submissions from applicants whose place of residence is legally irrelevant 41

6. More contact with the forum state is constitutionally Required to assert personal jurisdiction over a nonresident defendant when the contacts are distinct from the alleged merits of the suit. In addition, since none of the allegedly unlawful acts occurred in Illinois, that state has only a de minimus interest in the lawsuit 44

C. The Court Of Appeals Correctly Determined That The District Court Did Not Abuse Its Discretion In Concluding That Petitioner Was Provided All Relevant Information Properly Requested With Respect To The Issue Of Personal Jurisdiction 47

III. CONCLUSION 56

TABLE OF AUTHORITIES

Cases	Page
Aigner v. Bell Helicopters, 86 F.R.D. 532 (N.D.Ill. 1980)	46
Athletes Foot of Delaware v. Ralph Libonati Co., Inc., 445 F.Supp. 35 (D.Del.1977)	23
Black v. Acme Markets, Inc., 564 F.2d 681 (7th Cir. 1979)	21
Chromium Industries v. Mirror Polishing & Plating Co., Inc., 448 F.Supp. 544 (N.D.Ill. 1978)	23
Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977)	45
Driver v. Helms, 557 F.2d 147 (1st Cir. 1978), rev'd on other grounds sub nom., Stafford v. Brig[illegible], 444 U.S. 527, 100 S.Ct. 7[illegible] (1980)	20,30,31
Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979)	20,30,31
Friends of Animals, Inc. v. Am. Veterinary Medical Ass'n, 310 F.Supp. 620 (S.D.N.Y. 1970)	23
F.T.C. v. Browning, 435 F.2d 96 (D.C. Cir. 1970)	28
F.T.C. v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981)	26,29,30
Great Western United Corp. v. Kidwell, 557 F.2d 1256 (5th Cir. 1978), rev'd on other grounds sub nom., Leroy v. Great Western United Corp., 443 U.S. 173, 99 S.Ct. 2710 (1979)	21

Haile v. Henderson Nat. Bank, 657 F.2d 816 (6th Cir. 1981) 20
Hanson v. Denckla, 357 U.S. 253, 78 S.Ct. 1229 (1958) 42,44

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (1982) 20
International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945) ii,32,56

Jamesbury v. Kitamura Value Mfg. Co., Ltd., 484 F.Supp.533 (S.D.Tex. 1980) 46

Mississippi Pub. Co. v. Murphree, 326 U.S. 438, 66 S.Ct. 242 (1946) 20

Oddi v. Mariner-Denver, Inc., 461 F.Supp. 306 (S.D.Ind. 1978) 35

Pennoyer v. Neff, 95 U.S. 114, 24 L.Ed. 565 (1878) i
Pocahontas Supreme Coal Co. v. National Mines Corp., 90 F.R.D. 67 (S.D.N.Y. 1981) 23

Staffin v. Greenberg, 509 F.Supp. 825 (E.D.Pa. 1981) 46
Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774 (1980) 20
Standard Fittings Co. v. Sapag, S.A., 625 F.2d 630 (5th Cir. 1980) 47

Tommills Brokerage Co. v. Loeb, Rhoades & Co., 411 F.2d 764 (7th Cir. 1969) 46

Ustin v. Hilton Casinos, Inc., 564 F.2d 1218 (9th Cir. 1977) 35

Vespe Contracting Co. v. Anvan Corp., 433 F.Supp. 1226 (E.D.Pa. 1977) 47

Wood v. Santa Barbara Chamber of Commerce, Inc., 507 F.Supp. 1128 (D.Nev. 1980) 23

Worlawide Volkswagon v. Woodson, 444 U.S. 286, 100 S.Ct. 559 (1980) i,47,51

Constitutions

United States Constitution
Eleventh Amendment i,12
Equal Protection Clause 15
Privileges and Immunities Clauses 15

Statutes

United States Code
Title 15, Section 4 14
Title 15, Section 15 17
Title 15, Section 22 ii,21,22,23,24,25
Title 15, Section 49 28,29
Title 28, Section 1331 14
Title 28, Section 1332 14
Title 28, Section 1337 14
Title 28, Section 1343(3) 14
Title 28, Section 1391(b) 22
Title 42, Section 1983 15
Title 42, Section 1985 15
Title 42, Section 1988 17

California Business and Professions Code Section 6001 34

Ill. Rev. Stat., Chapter 110, Sections 16-18 (Illinois Long Arm Statute) ii,14,19,21,32,56

Rules

Federal Rules of Civil Procedure
- Rule 4(e) ii, 14,21,22
- Rule 4(f) 29,30
- Rule 8 i,12,13
- Rule 9 i,12,13
- Rule 10 i,12,13
- Rule 12(b) 4,12,17
- Rule 23 i,13

Rules of the Supreme Court of the United States
- Rule 17 19

Miscellaneous

Notes, 61 B.U.L.Rev. 403 (1981) 21

2 J. Moore, Federal Practice (2nd ed. 1981) 21

4 C. Wright & A. Miller, Federal Practices and Procedures (1969) 21

Restatement (Second) Conflict of Law, Section 52, Comment b (1971) 35

No. 82-748

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

FREDERICK A. WEIN, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF OTHERS SIMILARLY SITUATED,

Petitioner,

vs.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA AND THE STATE BAR OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's order (opinion) in this case. That order, dated June 29, 1982, is unreported. (A typewritten copy is attached to the petition for

writ of certiorari as Appendix A; and for ease of reference, a photocopy of the original opinion is attached to this brief as an appendix.)

I

COUNTERSTATEMENT OF THE CASE

This case arises out of petitioner's unsuccessful attempt to pass the July 1980 administration of the California bar examination as an attorney applicant for admission to practice law in California. At the time he took the examination, petitioner was a resident of California, but sometime thereafter he travelled to Illinois where he took up residence and filed the instant combined diversity and federal question (i.e., civil rights and antitrust) action against respondent the State Bar of California ("respondent") and its component Committee of Bar Examiners

("Committee") on behalf of himself and an alleged class consisting of all others who failed the examination. The action was filed in the United States District Court for the Northern District of Illinois, Eastern Division.

Plaintiff's second amended complaint in the action alleges in part that respondent's Committee "engaged in fraudulent, dishonest, and improper grading of the essay portion of the examination in breach of contract, by fraud, misrepresentation, deception, and false promise in order to restrict and keep down the number of applicants passing the examination . . . " The prayer is for injunctive relief establishing revised grading criteria for the California bar examination and a declaration that (apparently) all those who failed the examination be instead deemed to have passed; and for

compensatory, punitive and treble damages.

Plaintiff's second amended complaint was ultimately dismissed by the federal district court in Illinois pursuant to Fed.R.Civ.P. 12(b)(2), for lack of jurisdiction over the person of respondent. On appeal, the district court's judgment of dismissal was affirmed by the United States Court of Appeals for the Seventh Circuit; and petitioner's petition for rehearing and suggestion for hearing in banc was denied.

As is revealed by petitioner's second amended complaint and affidavits, discovery and other documents filed in the district court relative to the issue of personal jurisdiction, the State Bar of California (i.e., respondent) is a public corporation in the judicial branch of government of the State of California

which acts as the administrative arm of the Supreme Court of California, inter alia, in all matters relating to the admission of attorneys to practice law in California. Through its Committee, respondent administers the statutory requirements to be certified to the Supreme Court of California for admission to practice law, which requirements include passage of the California General Bar Examination or the California attorneys' examination.

Respondent maintains offices only in Los Angeles and San Francisco, California. Respondent has no officers, employees, agents, office or place of business in Illinois, and has not appointed an agent for service of process there. Respondent does not send employees or agents to Illinois or other states for any purpose other than attendance at periodic professional

seminars and educational meetings.* Moreover, respondent has no assets, bank accounts or real or personal property in Illinois; it does not advertise for or solicit bar applications in Illinois and it is not listed in any telephone directory in that state.

Respondent requires that its members maintain a current address, but it does not require that its members maintain a California mailing address. Respondent's records reflect that on April 10, 1981, it had 71,495 members, 4,170 of whom maintained mailing

---

* Members of respondent's Committee of Bar Examiners have attended seminars and instructional meetings and conferences in Illinois and many other states over the years, chiefly sponsored by or in conjunction with meetings of the American Bar Association ("ABA") and the National Conference of Bar Examiners, an ABA affiliate from which respondent's Committee obtains moral character information relative to out-of-state applicants.

addresses outside of California, approximately 413 of those in Illinois.

The respondent mails the following to its members, wherever they may reside, according to their current address as reflected in respondent's records: (a) annual membership fee statements; (b) if membership fees are not timely paid, notices of penalties for late payment and notices of suspension for nonpayment; (c) copies of disciplinary orders entered by the Supreme Court of California; (d) the State Bar magazine. The Committee does not list the dates of the California bar examination in any national publication, although others such as law schools and bar preparation courses do.

According to petitioner's second amended complaint, petitioner was admitted to practice law in Illinois in 1974 and for at least four of the six

years preceding the July 1980 administration of the California bar examination, had practiced law in Illinois and other jurisdictions. Petitioner presently is a resident of Cook County, Illinois.

On April 1, 1980, petitioner filed with the Committee in California an attorney application for admission to practice law in California. Petitioner's application reflected a mailing address of China Lake, California, and in the application petitioner represented that he was and had been a resident of California since January 1980. The Committee's examination registration materials were mailed to petitioner at the China Lake, California, address.

Attorneys and general applicants from any state can apply to take the California bar examination without regard to citizenship. General applicants must take the General Bar Examination, which

at the time consisted primarily of a one-and-one-half-day essay section of nine questions and a one-day multiple choice question section (i.e. the Multistate Bar Examination or "MBE"). The essay section is prepared, administered and graded by the Committee, while the MBE is prepared and graded by Educational Testing Service but administered in California by the Committee.

Attorney applicants (such as petitioner) who have been admitted to practice in another state and who have been actively engaged in the practice of law for four of the six years immediately preceding the administration of the California bar examination for which they apply may elect to take the General Bar Examination (i.e., both the MBE and essay sections) or the attorneys'

examination, which consists of the essay section of the general examination only.

As indicated, petitioner sat for the July 1980 California attorneys' examination. Sometime after the essay answers were graded the Committee mailed a notice to petitioner advising him that he had failed. In accordance with a notice of change of address received from petitioner after the examination, notification of the results was mailed to petitioner at 600 Laramie Avenue, Wilmette, Illinois. With the notice there was sent to petitioner (and to all others who failed the examination no matter where they resided) an application form for the next examination.*

---

* Usually there are only about two weeks between the time the results of the examination are mailed and the date to timely file an application for the next bar examination.

The Committee's available records for the nine bar examinations given in California during the period July 1976 through July 1980 indicate that 401 general and attorney applicants who had a last known current address in Illinois or a permanent address in Illinois both applied for and took one or more of these examinations.

Petitioner's original complaint in this action was filed on March 10, 1981. At the same time petitioner filed and served a first set of interrogatories, Nos. 1 through 5. Summons on the original complaint was personally served by a federal marshal in California on March 19, 1981, by delivering copies to employees of respondent there. However, on March 17, 1981, before the original complaint was served by the federal marshal, plaintiff voluntarily filed an amended complaint, which was "served" by

mailing a copy by first class mail to respondent's San Francisco, California, office.

On April 15, 1981, respondent served and mailed for filing a motion to dismiss petitioner's amended complaint pursuant to Fed.R.Civ.P. 12(b), on the grounds of failure to obtain personal jurisdiction, failure to establish subject matter jurisdiction, that petitioner's claims for damages were barred by the Eleventh Amendment, that respondent was clothed with judicial immunity from damage awards in performing its bar admissions functions and that the complaint failed to otherwise state claims upon which relief could be granted because petitioner had not alleged sufficient facts (as distinguished from vague, conclusory assertions) to satisfy the requirements of Fed.R.Civ.P. 8, 9(b) and 10. Also on

April 15, 1981, respondent served and mailed for filing partial answers and objections to plaintiff's first set of interrogatories. An amended answer and objection to interrogatory No. 5 of the first set was filed on April 27, 1981.

Subsequently, the district court dismissed petitioner's amended complaint with leave to amend, for failure to comply with Fed.R.Civ.P. 8, 9, 10 and 23, the court indicating that respondent need not file another motion to dismiss and that it would consider respondent's jurisdictional arguments when petitioner filed a further amended pleading. (Petition, p. A36.)

On May 29, 1981, petitioner filed a second amended complaint, which also was served by first class mail addressed to one of respondent's attorneys at its offices in San Francisco, California. In his second amended complaint,

petitioner alleged that the United States District Court for the Northern District of Illinois (Eastern Division) obtained personal and subject matter (i.e. substantive) jurisdiction of respondent and its component Committee of Bar Examiners under 15 U.S.C. § 4 (Sherman Act); 28 U.S.C. §§ 1331 (federal question), § 1332 (diversity), § 1337 (interstate commerce and anti-trust), § 1343(3) (civil rights), Fed.R.Civ.P. 4(e); Ill.Rev.Stat. Chapter 110, sections 16-18 (the Illinois long arm statute),* and ancillary and pendant jurisdiction. Petitioner's second amended complaint contains 12 alleged

---

* Specifically, petitioner asserts that the district court obtained personal jurisdiction over respondent through service of process effected pursuant to subsections (a) (transaction of business in Illinois) and (b) (commission of tortious act in Illinois) of section 17, Chapter 110, Ill.Rev.Stat.

causes of action, briefly summarized as follows: violation of the antitrust laws (count 1); civil rights violations under 42 U.S.C. § 1983 and § 1985 (counts 2 and 3); violation of plaintiff's rights under the equal protection clause, the due process and privileges and immunities clauses of the United States Constitution (counts 4 through 7); and state causes of action for unjust enrichment, intentional infliction of emotional distress, misrepresentation, fraud, and breach of contract (counts 8 through 12).

In his second amended complaint, petitioner alleged in essence that in order to minimize competition with those already admitted to practice in California and to acquire additional income from repeat takers of the bar examinations, the Committee maintains an artificially low passing rate ("typically

less than 50%") through fraudulent grading practices and procedures, misrepresenting to applicants for admission that on every question comprising the essay section of the California bar examination it is possible to obtain a maximum grade of 100 while in fact the highest grade obtainable from the Committee is 70, the minimum possible passing grade. Petitioner prayed for relief in the form of a retrospective order from the federal district court in Illinois establishing revised grading criteria to be applied by the Committee* relative (apparently) to the July 1980 administration of the California examination together with a "declaration" that

---

* The Committee acts only as the administrative arm of the Supreme Court of California in matters relating to admission to practice law in California. The plaintiff has not named or served the Supreme Court Justices.

petitioner and all other unsuccessful examinees instead passed the essay portion of the examination under such revised grading procedures and therefore must be certified to the California Supreme Court for admission to practice law in California. Petitioner also sought a prospective order that respondent "be permanently enjoined from conducting future bar examinations in the manner complained of herein." And finally, petitioner prayed for a retroactive award of "unspecified" compensatory and punitive damages, threefold damages and attorneys' fees under 15 U.S.C. § 15 and attorneys' fees and costs under 42 U.S.C. § 1988.

As indicated, the federal district court in Illinois dismissed the petitioner's second amended complaint under Fed.R.Civ.P. 12(b)(2), for lack of jurisdiction over the person of

respondent, the district court also concluding that in these circumstances it was "unnecessary and possibly improper" to address the other grounds for dismissal advanced in respondent's motion. (See petition, pp. A21-A33.) A motion for reconsideration was denied by the district court. (Petition, pp. A34-A35.) In its order (opinion) affirming the district court's judgment of dismissal (petition, pp. A1-18, A20), the Court of Appeals for the Seventh Circuit likewise concluded that since petitioner's appeal was from a dismissal for lack of personal jurisdiction, "the remaining issues in [petitioner's] brief, e.g. subject matter jurisdiction, sufficiency of his claims, etc. are not properly before this court." (Petition, p. A21 n.5.)

Petitioner timely filed the instant petition for writ of certiorari, seeking

review of the Court of Appeal's decision pursuant to Rule 17, Rules of the Supreme Court of the United States.

II

REASONS WHY THE WRIT SHOULD BE DENIED

A. SINCE PETITIONER EXPRESSLY ELECTED NOT TO UTILIZE A FEDERAL STATUTE PROVIDING FOR NATIONWIDE SERVICE OF PROCESS AS TO HIS ONE ANTITRUST CLAIM, PERSONAL JURISDICTION AS TO ALL PETITIONER'S CLAIMS (i.e. DIVERSITY AND NONDIVERSITY) IS LIMITED TO THAT WHICH MAY BE OBTAINED UNDER THE ILLINOIS LONG ARM STATUTE USED BY PETITIONER

Petitioner asserts that federal district courts may assert nationwide personal jurisdiction in any case involving a federal question as long as the defendant has minimum contacts with the United States. (Petition, pp. i, 3-4, 16.) While this proposition is true where there is a federal statute

providing for such nationwide service, absent such a statute federal district courts are subject to the same minimum-contacts-with-the-forum-state standard as are state courts when service is attempted on nonresidents pursuant to a state long-arm statute. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553, 4558 (1982) (Powell, J. concurring); Stafford v. Briggs, 444 U.S. 527, 554, 100 S.Ct. 774, 789 (1980) (Stewart, J. dissenting); Mississippi Pub. Co. v. Murphree, 326 U.S. 438, 444-445, 66 S.Ct. 242 (1946); Haile v. Henderson Nat. Bank, 657 F.2d 816, 826 n.10 (6th Cir. 1981); Fitzsimmons v. Barton, 589 F.2d 330, 332-333 (7th Cir. 1979); Driver v. Helms, 557 F.2d 147, 155-156 (1st Cir. 1978), rev'd on other grounds sub nom., Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774 (1980);

Black v. Acme Markets, Inc., 564 F.2d 681, 683-686 and 686 n.8 (7th Cir. 1979); 2 J. Moore Federal Practice ¶ 4.32[1], pp. 4-343 to 4-344; ¶ 4.32[2], pp. 4-348, 4-352 (2nd ed. 1981); 4 C. Wright & A. Miller Federal Practices and Procedures, § 1075, p. 302 n.25 (1969); Notes, 61 B.U.L.Rev. 403 n.3 (1981). And see also Great Western United Corp. v. Kidwell, 557 F.2d 1256 (5th Cir. 1978), rev'd on other grounds sub nom., Leroy v. Great Western United Corp., 443 U.S. 173, 99 S.Ct. 2710 (1979). Petitioner served process using the Illinois long arm statute as permitted under Fed.R.Civ.P. 4(e), second sentence.* While the anti-trust statutes do provide for nationwide service of process (15 U.S.C. § 22) petitioner expressly admits that he

---

* Petitioner's complaint included a claim based on the antitrust statutes.

elected not to use this provision, and as is noted in the penultimate paragraph of the Advisory Committee's comment concerning the 1963 amendment of Rule 4(e), "[i]f the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence) the party seeking to make the service may proceed under the Federal or the State law, at his option." (Emphasis added.)*

---

* It is unlikely that petitioner could have served process under 15 U.S.C. § 22 had he attempted to do so. Aside from the fact that the State Bar of California is not a private corporation, venue in an antitrust case is proper "only in the judicial district where all defendants reside, or in which the claim arose" (28 U.S.C. § 1391(b)), or where the defendant "may be found or transacts business" (15 U.S.C. § 22). Petitioner has never contended that the alleged antitrust activites took place elsewhere than California. Since the standard "may be found or transacts business" requires at least as much contact with the forum venue (not the

Although petitioner attached 13 pages of his reply brief to the Seventh Circuit as part of Appendix A to his petition (pp. A72-A85), he omitted a

---

entire state) as the traditional minimum contacts standard, venue under the antitrust act is proper only if personal jurisdiction could otherwise be established. Chromium Industries v. Mirror Polishing & Plating Co., Inc., 448 F.Supp. 544, 551 (N.D.Ill. 1978). It has also been held that venue under 15 U.S.C. § 22 is improper in a district in which the plaintiff has suffered no injury. Wood v. Santa Barbara Chamber of Commerce, Inc., 507 F.Supp. 1128, 1141 (D.Nev. 1980). Plaintiff's complaint is about the alleged fraudulent grading of his essays in California and his resultant inability to practice there, not in Illinois.

Where antitrust venue is improper, service of process under 15 U.S.C. § 22 has been held to be invalid. Athletes Foot of Delaware v. Ralph Libonati Co., Inc., 445 F.Supp. 35, 45 (D.Del. 1977) ("service beyond state boundaries is authorized only when there is proper venue."); Chromium Industries, supra, 448 F.Supp. at 550; Friends of Animals, Inc. v. Am. Veterinary Medical Ass'n, 310 F.Supp. 620, 624 (S.D.N.Y. 1970); Pocahontas Supreme Coal Co. v. National Mines Corp., 90 F.R.D. 67, 72 (S.D.N.Y. 1981); Wood v. Santa Barbara, supra, 507 F.Supp. at 1140-1141.

portion in which he expressly disclaimed use of 15 U.S.C. § 22, as follows:

> "Plaintiff was fully aware of the nationwide service under 15 USC 22 as previously shown hereinabove. However, because of fear of possible complications under the Illinois Long-Arm Statute, Chapter 110, Section 17(3) which states:
>
> "'Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.'
>
> "Plaintiff was fearful that service under 15 USC 22 might be construed as violating this provision of the long-arm statute and accordingly, the complaint does not cite such as basis for jurisdiction. However, plaintiff still has the right to serve defendant in other actions in any way available, including institution of other actions in Illinois and California." (Petitioner's reply brief before the Seventh Circuit, p. 9.)

In addition, at oral argument before the Court of Appeals petitioner expressly disavowed any reliance on 15 U.S.C. § 22 or any other federal statute providing for nationwide service of process. (See footnote 5 to the court's opinion; petition, p. A5.*) Thus the question narrows to whether absent a federal statute providing for nationwide service of process a federal district court in a combined federal question and diversity case may utilize a state long arm statute to obtain personal jurisdiction over a defendant who has minimum contacts with the United States but not

---

* In view of this admission, petitioner's statement that this issue "was ignored by the Court of Appeals" (petition, p. 1) is obviously incorrect. Since petitioner affirmatively opted not to use the only federal statute providing for nationwide service of process even arguably available to him, the issue was not properly before the court below.

with the forum state. Viewed in this context the cases relied upon by petitioner are readily distinguishable since all involve a federal statute authorizing nationwide service of process, and thus the "conflict" between the circuits alleged by petitioner does not exist.

Petitioner cites F.T.C. v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981), as one case which is allegedly inconsistent with the decision of the Court of Appeals below and claims that the case holds "that the federal courts have nationwide jurisdiction in federal question cases." Petition, p. 1. In Jim Walter Corp. the F.T.C., as a result of complaints by consumers in Texas and adjacent states, had initiated a multi-state investigation of the Jim Walter Corporation, a Florida-based holding company providing "corporate services"

for several wholly owned subsidiaries engaged in the construction and marketing of new homes. One subsidiary, Jim Walter Homes, Inc., was engaged in building and selling homes throughout the South and Southwest, and had twenty offices in Texas, including one in Dallas.

The F.T.C. issued an investigatory subpoena duces tecum from 'ts office in Dallas which was served on the Florida office of Jim Walter corporation. When Jim Walter refused to comply the F.T.C. brought a summary order to show cause proceeding to enforce the subpoena in the northern district of Texas.

Jim Walter Corp. objected to the assertion of "personal jurisdiction" by the federal district court in Texas on the ground, among others, that since it allegedly transacted no business in the northern district of Texas the federal

court lacked a constitutional basis for exercising personal jurisdiction consistent with the due process clause.

In affirming the district court, the Fifth Circuit first held that section 9 of the Federal Trade Commission Act (15 U.S.C. § 49) implicitly authorizes nationwide service of process. In reaching this conclusion the panel relied primarily on F.T.C. v. Browning, 435 F.2d 96 (D.C.Cir. 1970), where the court concluded in essence that in enacting the Federal Trade Commission Act empowering the F.T.C. to conduct nationwide investigations expressly utilizing subpoenas for the attendance of witnesses and the production of documents "from any place in the United States," it would have been antithetical for Congress not also to have intended that there be nationwide service of process, especially since Congress had

limited venue in enforcement actions to only the federal district court "within the jurisdiction of which" such nationwide inquiry was being held. (15 U.S.C. § 49.)*

In view of this determination of the court in Jim Walter Corp. that 15 U.S.C. § 49 authorizes nationwide service of process, the constitutional portion of the opinion takes on a different focus. Thus when the court stated in part II.C of the opinion that: "[s]ubject only to the regulation of Congress, each federal court exercises the 'judicial power of the United States,' not a judicial power constitutionally limited by the boundaries of a particular district" and "[b]ecause the district court's

---

* It should also be noted that Fed.R.Civ.P. 4(f) limits extraterritorial service of process "other than a subpoena."

jurisdiction is always potentially, and in this case actually, coextensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States" (emphasis in original; footnote omitted)--the court in Jim Walter Corp. clearly was speaking only of a situation where lower federal courts created by Congress are freed from the usual territorial restraints of Fed.R.Civ.P. 4(f) because Congress has acted to eliminate those restraints by authorizing nationwide service of process. That the court recognized that this was the situation is clearly shown by footnote 9 of the opinion, 621 F.2d at 256.

The other cases relied upon by petitioner, Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir., 1979), and Driver v. Helms, 577 F.2d 147 (1st Cir. 1978),

rev'd on other grounds sub nom., Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774, 785 (1980), also involved a federal statute providing for nationwide service of process and also noted the distinction. (See Fitzsimmons at 589 F.2d 332, 333; Driver v. Helms at 577 F.2d 155, esp. n.23, 156.)

Thus the claimed conflict is actually a principled distinction based on the presence or absence of a federal statute authorizing nationwide service of process. Since there is no conflict and the cases have uniformly agreed with the position of the court of appeals below, the only real question is whether, under the traditional minimum-contacts-with-the-forum state analysis, the district court in Illinois obtained personal jurisdiction over respondent.

B. THE COURTS BELOW PROPERLY DISMISSED THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION. THE UNDISPUTED FACTS DEMONSTRATE THAT THERE ARE NO "MINIMUM CONTACTS" WITH ILLINOIS WHICH WOULD MAKE IT FAIR AND REASONABLE TO REQUIRE RESPONDENT TO CONDUCT ITS DEFENSE IN THAT STATE

It has been demonstrated that since plaintiff did not utilize any federal statute providing for nationwide service of process, his attempt to effect service utilizing the Illinois long arm statute is limited by the traditional minimum-contacts-with-the-forum-state standard of International Shoe and its progeny. Under this standard respondent lacks sufficient contact with the state of Illinois to allow a finding of personal jurisdiction in Illinois consistent with due process.

Little can be added to the excellent analysis of this issue in the opinion of the Seventh Circuit (petition, pp. A1-

A33); a few points do, however, deserve emphasis and a brief explanation.

1. The Presence of Offices of Califonia Tax Agencies in Chicago Is Not a Contact of the State Bar.

Petitioner several times mentions that two tax agencies of the State of California (i.e., the State Board of Equalization and the State Franchise Tax Board) have offices in Chicago. Petitioner argues in essence that this presence or "contact" of two California executive branch tax agencies is attributable for minimum contacts analysis purposes to respondent State Bar, an unrelated and independent agency in the judicial branch of California government.

It seems questionable at best whether the presence of these offices in Chicago would allow an assertion of

personal jurisdiction over even the two tax agencies, since their only purpose in Chicago is to collect taxes owed by those who have done business in California. Moreover, since these are executive branch agencies their contacts with Illinois are irrelevant to respondent, an agency in the judicial branch of state government which acts as the administrative arm of the Supreme Court of California in admission matters. See Counterstatement of the Case, supra. As the Seventh Circuit observed in its order:

> "The State Bar, as an entity, is expressly amenable to suit. Cal. Bus. & Prof. Code § 6001. Clearly that entity--not the state --is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has 'minimum contacts' with the forum." (Petition, A10 n.9.)

A close analogy would be to compare the state of California and its agencies with a corporation and its subsidiaries. Cases have uniformly held that contacts by one subsidiary (e.g. the tax boards) do not allow an extension of personal jurisdiction over either the parent (California) or another subsidiary (respondent), absent actual daily control and direction. See Restatement (Second) Conflict of Law, § 52, comment b (1971); Uston v. Hilton Casinos, Inc., 564 F.2d 1218, 1219 (9th Cir. 1977); Oddi v. Mariner-Denver, Inc., 461 F.Supp. 306, 310 (S.D.Ind. 1978).

2. Attendance at Occasional Meetings and Seminars in Chicago Is Not a Business Contact.

An Affidavit attached to respondent's motion to dismiss stated in part that State Bar employees attend occasional professional meetings and seminars in

Chicago. While the appeal was pending, petitioner read about periodic meetings of bar examiners from the several states sponsored by the National Conference of Bar Examiners in Chicago, which petitioner brought to the attention of the court below through an appellate level "discovery motion."* (Petition, pp. A62-A71.)

In this connection, it should also be emphasized that the purpose of attendance at these meetings is not to transact or discuss business in Illinois

---

* Respondent did not reply to petitioner's "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery . . . " since it found no authority providing for either the motion or a reply. Nevertheless, the Seventh Circuit granted petitioner's motion in part "to the extent that we consider plaintiff's additional allegations." (Petition, p. A8 n.8.) The court below did deny an alternative request for issuance of a subpoena directed to the National Conference of Bar Examiners in Chicago. (Petition, p. A8 n.8.)

but merely to improve professional competence and ability of the volunteer members of the Committee to administer the statutory requirements for admission in California, including the bar examinations administered there.

3. The California Bar Examination Is Not Given in Illinois or in Any State Other Than California.

Before both the district court and the court of appeals, petitioner asserted that 40 percent of the California bar examination is given in Illinois, although he was corrected each time. He has now made the same incorrect assertion to this Court. (Petition, pp. 6, 15.)

The facts are, as petitioner well knows by now, that California requires a general applicant to pass both an essay examination, given only in California, and the MBE, administered in 46 states

by their respective bar examining authorities and provided and graded by Educational Testing Service. Under present policy in California an applicant need not pass both sections at one sitting, as long as both portions are passed within the same 24-month period.

Since the MBE is a standardized test given in 46 states, California, as a professional courtesy, accepts the scores of examinations administered by the bar examiners in other states. See footnote 7 of the Seventh Circuit opinion. (Petition, p. A8.) The California examination is emphatically not given in Illinois, although clearly if it wished, the Committee could refuse to permit the transfer of MBE scores and require that applicants sit for the California administration of the MBE. California's practice of accepting the transfer of a passing score according to

California standards with regard to the MBE administered in other states is similar to its acceptance of proof of college and law school graduation from schools in other states, rather than requiring all applicants to have graduated from California schools. Moreover, it would be equally senseless to assert that accepting applications from those who attended school in Illinois is a contact of respondent with Illinois; yet this is little different than its acceptance of MBE scores administered by bar examiners in other states. Petitioner has asserted that respondent, in some unspecified manner, derives benefit from law schools in other states. (Petition, pp. ii, 5.) However, clearly respondent is merely a state regulatory agency and derives absolutely no benefit from the admission of a person of any state to practice law in California.

The Seventh Circuit characterized California's acceptance of the results of the MBE given in other states as "contingent upon the unilateral act of an applicant in submitting his scores," and thus not a constitutional contact with the state of Illinois. The court also noted that petitioner himself did not take the MBE in either California or Illinois, since as an out-of-state practicing attorney he had the option of taking only the essay portion, which he failed. (Petition, p. A12 n.11.)

4. The Submission of a Bill of Costs Is Not a Contact.

Petitioner counts as a contact that a bill of costs was submitted to the court of appeals. (Petition, p. iv.) Costs were awarded to respondent on appeal (see petition, p. A20), and submission of a bill of costs pursuant to such an award is merely a normal part

of a lawsuit. At bottom, petitioner's claim essentially is that by properly asserting and successfully litigating lack of personal jurisdiction and being awarded costs on appeal, respondent has in effect by such conduct now had sufficient contact with Illinois to allow an assertion of personal jurisdiction. It is submitted that the argument is simply internally inconsistent and totally without merit.

5. The Majority of the Contacts Relied Upon by Petitioner Are Simply Unilateral Submissions from Applicants Whose Place of Residence Is Legally Irrelevant.

Petitioner lists as significant contacts with the state of Illinois: the fact that applicants have requested a certification from their law schools or state supreme court sent to respondent; that applicants from Illinois have applied to take the bar examination in California; and that along with these

applications applicants from Illinois sent the required fee;* and that applicants from Illinois have taken the California bar examination. (Petition, pp. i, ii.)

Each of these activities is unilateral on the part of the applicant and does not rise to the level of a constitutional contact under the standard of Hanson v. Denckla, 357 U.S. 253, 78 S.Ct. 1229 (1958). And see the discussion of this point in the opinion of the court below. (Petition, p. A9.)

Petitioner also lists additional contacts: that respondent sends applications to out-of-state residents in response to their request; that

---

* In this context it should be noted that respondent is a public corporation which serves as the administrative arm of the California Supreme Court and does not derive profit from fees submitted with the application forms.

respondent mails back an acknowledgement of filing and other materials related to the examination, and that notice of failure is sent along with an application to take the next examination. All these items are sent only in response to an applicant's unilateral request, with the exception of the application for the next bar examination, which is enclosed for the applicant's convenience. This application is not a solicitation as petitioner claims, since respondent, as a state regulatory agency in the judicial branch of government, gains nothing by its being returned.

The state of an applicant's residence is legally irrelevant under California law. Thus application materials are sent to applicants in whatever state or country they may reside. As the Seventh Circuit noted, any communication with Illinois "is

generated by the 'unilateral activity' of persons who happen to be Illinois residents. Such activity cannot 'satisfy the requirement of contact' constitutionally required to sustain personal jurisdiction." (Petition, pp. A11-A12, quoting Hanson v. Denckla, supra, 357 U.S. at 253.)

6. More Contact with the Forum State Is Constitutionally Required to Assert Personal Jurisdiction over a Nonresident Defendant When the Contacts Are Distinct from the Alleged Merits of the Suit. In Addition, Since None of the Allegedly Unlawful Acts Occurred in Illinois, that State Has Only a De Minimus Interest in the Lawsuit.

Petitioner's complaint is founded on allegations that California unlawfully restricts entry into the legal profession in California and unfairly grades bar examinations in California. Not one act related to the alleged merits of petitioner's suit is claimed to have

occurred in Illinois, or for that matter in any state other than California.

Cases have consistently held that where the cause of action is distinct from the contacts with the forum state more contacts are required in order to constitutionally assert personal jurisdiction over a nonresident defendant:

> "If the nonresident defendant's activities within a state are 'substantial' or 'continuous and systematic,' there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. . . . If, however, the defendant's activities are not so pervasive as to subject him to general jurisdiction, the issue whether jurisdiction will lie turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action." (Emphasis added.) Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

See also Tommills Brokerage Co. v. Loeb, Rhoades & Co., 411 F.2d 764, 767 (7th Cir. 1969); Aigner v. Bell Helicopters, 86 F.R.D. 532, 536 (N.D.Ill. 1980); Staffin v. Greenberg, 509 F.Supp. 825, 831 (E.D.Pa. 1981); Jamesbury v. Kitamura Value Mfg. Co., Ltd., 484 F.Supp. 533, 536-537 (S.D.Tex. 1980).

Since none of the allegedly unlawful acts occurred in Illinois, and since even were petitioner to ultimately prevail on the merits, the only benefit would be to those who choose to reside in California. Illinois has little or no interest in the lawsuit. The court below included this lack of state interest as a factor in its minimum contacts analysis: "Moreover, that state [i.e., Illinois] has no significant interest in adjudicating the dispute." (Petition, p. A14.)

The extent of "the forum State's interest in adjudicating the dispute"

has been held a significant factor in determining whether it is fair and reasonable to subject an out-of-state defendant to personal jurisdiction. Worldwide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 559, 564 (1980); Standard Fittings Co. v. Sapag, S.A., 625 F.2d 630, 641 (5th Cir. 1980); Vespe Contracting Co. v. Anvan Corp., 433 F.Supp. 1226, 1235 (E.D.Pa. 1977).

C. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PETITIONER WAS PROVIDED ALL RELEVANT INFORMATION PROPERLY REQUESTED WITH RESPECT TO THE ISSUE OF PERSONAL JURISDICTION

Petitioner several times complains that he was denied any discovery with respect to the issue of personal jurisdiction. (Petition, pp. v, xi, 2, 23-25.) This is simply not the case. In fact petitioner was afforded all

information relevant to the issue of personal jurisdiction which was properly requested.

Along with the original complaint petitioner served a set of five interrogatories. Petitioner recognized that interrogatories 1, 2 and 4 were not relevant to the issue of personal jurisdiction and at one time stipulated that no answers were required until the court had ruled on the issue of personal jurisdiction.*

Respondent then filed partial answers and objections to interrogatories 3 and 5. Interrogatory No. 3 requested the names and addresses of all Illinois residents who took the bar examination over the past ten years.

---

* Petitioner later withdrew his stipulation, charging that it had been procured by the fraudulent misrepresentations of one of respondent's attorneys.

The number of those who listed Illinois addresses was provided from July 1976 (the first year records are available) to July 1980. The specific names and addresses of the individuals were not given to petitioner, on the basis that they were irrelevant to the issue of personal jurisdiction and also were confidential and involved privacy rights of those applicants.

Interrogatory No. 5 requested copies of all examination questions and model answers, copies of grading procedures, and the identity of all graders. Answers to this interrogatory were not provided, and petitioner did not seek to compel answers. In any event, it is submitted that this information is clearly irrelevant to the issue of personal jurisdiction.

Along with his opposition to respondent's motion to dismiss,

petitioner served another interrogatory, No. 6, consisting of several subparts. As the courts below noted, interrogatory No. 6 is the only one really at issue, and on close examination the information it sought is only tenuously related at best to the issue of personal jurisdiction. (See petition, pp. A15-A17, A31-A32.)

Section (a) of interrogatory No. 6 requested information on "all income derived by defendants in any way from within the State of Illinois and the sources of such income." In this connection petitioner asserted that application fees are "substantial income derived from Illinois" and that membership dues from bar members living in Illinois are "substantial monies." This ignores the fact that respondent and its Committee merely receive money in California from applicants and attorneys

required by California statute and admission rule to pay such fees in California in order, respectively, to be examined for admission to practice and to continue to be licensed to practice in California. Certainly this "activity" does not constitute a minimal constitutional contact with Illinois or with any other state or country from which such monies may have been mailed. See World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 293, 100 S.Ct. 559, 566 (1980). By this interrogatory, therefore, plaintiff in effect sought an admission as to his characterization of fees as business income rather than facts truly relevant to the issue of personal jurisdiction.

Section (b) of interrogatory No. 6 requested "the number of applicants for the California bar examination who have taken the multistate portion of the bar examination in Illinois within 21 months

of taking the essay portion, and had the grade transmitted to [respondent]" in the last ten years. Clearly this has nothing to do with constitutional contacts with Illinois, since again as a matter of law petitioner is incorrect in his assumption that by allowing the transfer of MBE grades from Illinois or other states respondent's Committee is in effect giving the MBE in Illinois or such other states. As indicated above, the MBE is given in 46 states and is prepared and graded by the Educational Testing Service in Princeton, New Jersey. In each state in which it is utilized the MBE is administered by the bar examining authority of that state, not by respondent's examining Committee.

Section (c) of interrogatory No. 6 requested the respondent to "[s]tate and describe the numbers of members of the State Bar in Illinois and with

particularity all communications for the past five years in either direction between defendant and such members, including mail, literature, notices and all other correspondence." The number of attorneys who listed an Illinois address had already been given to petitioner and correspondence is sent to whatever address is listed as a professional courtesy, so that members are not required to maintain a California address. Furthermore, California has a unified bar and all attorneys licensed to practice in California are therefore members of respondent State Bar. However, very few are employed by or act as agents for the State Bar. This interrogatory, therefore, calls in the main for information unavailable to the State Bar and totally irrelevant to the existence of constitutional contacts. Also, it was clearly burdensome, overbroad, and to the

extent it sought correspondence involving refusal of admission or disciplinary action, it sought production of privileged and confidential information.

Section (d) requested a list of "instances of any members of [respondent] State Bar traveling from Illinois to California for reasons connected with [respondent], or of agents of [respondent] traveling to Illinois for any reasons." Section (e) requested "all mail and telephone communications between [respondent] and within Illinois not included in other interrogatories." Both these sections are at the very least vague and overbroad since they do not limit themselves to official acts. They include personal travel and communication, travel by attorneys who are merely members of the respondent, and communication unrelated to constitutional contacts within the state of

Illinois. Records for much of this information never existed. A complete answer to these questions would have been a voluminous list of activities irrelevant to the issue of personal jurisdiction.

It is submitted that the lower courts correctly rejected petitioner's contention that answers to interrogatory No. 6 would strengthen his case. As the district court stated: "The Discovery requests are only tenuously related to Wein's claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois . . . " (Emphasis in original.) See petition, p. A32. And the court of appeals upheld this determination, concluding that in light of its analysis of the issue of personal jurisdiction, there was no abuse of discretion in the district court's refusal to compel answers to

interrogatory No. 6. See petition, pp. A15-A17.

III

CONCLUSION

It is submitted that the courts below properly applied the minimum contacts analysis of International Shoe and its progeny since petitioner opted to attempt to effect service as to his alleged diversity and nondiversity causes of action only pursuant to the Illinois long arm statute. It is further submitted that applying such standard, the courts below correctly concluded that such minimum contacts were lacking. Certainly respondent (the State Bar of California and its Committee of Bar Examiners) did not purposely avail itself of the privilege of conducting activities within Illinois and thereby invoke the benefit and protection of its laws. And most emphatically respondent

had no reasonable expectation of being haled into court in Illinois, especially by one who was a California resident at the time he took the California bar examination about which he complains.

Petitioner has failed to demonstrate either that there is a conflict among the decisions of the federal courts of appeals or that the court below decided a federal question in a way in conflict with applicable decisions of this Court. Having failed to demonstrate special and important reasons for granting the writ as required by this Court's Rule 17, petitioner's petition for writ of certiorari should be denied.

Dated: December 1, 1982

Respectfully submitted,

HERBERT M. ROSENTHAL
ROBERT M. SWEET

By ROBERT M. SWEET

Attorneys for Respondent

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued: June 14, 1982

JUNE 29, 19 82

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

FREDERICK A. WEIN, individually and as a representative of a class of others similarly situated,
Plaintiff-Appellant,

No. 81-2708 vs.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA and THE STATE BAR OF CALIFORNIA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81-C-1312
Edwin A. Robson, Judge.

ORDER

This is an appeal from the district court's dismissal of the plaintiff's complaint because of lack of personal jurisdiction over the defendants. For the reasons stated below, we affirm that judgment.

I.

The plaintiff, Frederick A. Wein, is an Illinois attorney who in July 1980 took but failed the attorney's examination for admission to the State Bar of California.1/ On March 10, 1981, he filed this action in the Northern District of Illinois in an

---

1/ California makes available two methods for gaining admission to the practice of law: (1) an "attorney's examination," consisting primarily of essay questions, which may be taken by persons admitted to practice in other jurisdictions; and (2) a "general examination," consisting of both essay and Multistate Bar Examination sections, which is available to all qualified applicants.

attempt to challenge the legality of the grading of that examination. Summons were served on the defendants in California by a federal marshal. On May 13, the defendants moved to dismiss the action, arguing that the court lacked personal jurisdiction over them, and that the plaintiff's complaint was deficient in form. In response, the district court entered an order in which it: (1) dismissed the plaintiff's complaint for failure to comply with Fed. R. Civ. P. 8, 9, 10, and 23;2/ (2) reserved ruling on the defendants' jurisdictional objection, granting the plaintiff 20 days to file an amended complaint; and (3) stayed all discovery.3/

On May 29, the plaintiff filed an amended pleading. In it he alleged that the defendants maintain an artificially low passing rate for the attorney's examination in order to restrict the number of attorneys practicing in California and to force persons to retake the examination. He urged that these allegations grounded causes of action under the federal antitrust laws, constitutional and statutory civil rights provisions, and state contract and tort law. In addition, he asserted that personal jurisdiction over the defendants was established under Fed. R. Civ. P. 4(e) and Illinois' long-arm statute, Ill. Rev. Stat. ch. 110, pars. 16, 17, and 18.

On July 27, 1981, the court, renewing its consideration of the defendants' prior objection, entered an order dismissing the action for lack of personal jurisdiction. The plaintiff moved to amend that order under Fed. R. Civ. P. 59, requesting the court to transfer the case to an appropriate district under 28 U.S.C. § 1406(a). The court denied that motion. This appeal follows.

II.

The plaintiff raises three relevant claims before this court: (1) that the district court erred by dismissing this action for lack of personal jurisdiction over the defendants; (2) that the court erred by denying him an opportunity to pursue discovery concerning certain contacts between the defendants and the forum state; and (3) that the court abused its discretion by refusing to transfer this case to an appropriate district under 28 U.S.C. § 1406(a).4/ We consider these in turn.

2/ The plaintiff attempted to frame his suit as a class action.

3/ Following the defendants' motion, the plaintiff had served on them interrogatories inquiring into their relationship with the state of Illinois.

4/ Because this appeal is from a dismissal for lack of personal jurisdiction, the remaining issues raised in the plaintiff's brief, e.g., subject matter jurisdiction, sufficiency of his claims, etc., are not properly before this court.

A. Personal Jurisdiction

The plaintiff argues that jurisdiction over the defendants was established under Illinois' long-arm statute, applicable to this federal suit by virtue of Fed. R. Civ. P. 4(e).5/ Because that statute "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause," Fisons Limited v. United States, 458 F.2d 1241, 1250 (7th Cir.), cert. denied, 405 U.S. 1041 (1972), see Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957), an evaluation of the plaintiff's attempt to utilize it in this context must be guided by the "due process" standards articulated by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny.6/

5/ Although the plaintiff incorporated an antitrust claim in his complaint, at oral argument he expressly disavowed any reliance on the nationwide service provision of the Clayton Act, 15 U.S.C. § 22, as a means for establishing personal jurisdiction over the defendants. Thus we limit our discussion to the state long-arm statute. See Advisory Committee Notes to Fed. R. Civ. P. 4(e) ("If the circumstances of a particular case satisfy the applicable Federal law . . . and the applicable State law . . . , the party seeking to make the service may proceed under the Federal or the State law, at his option.").

6/ Although the Supreme Court's major pronouncements in this area have all arisen in the context of assertions of power by state courts, i.e. McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court of California, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), we have applied an International Shoe analysis in both diversity cases, see e.g. Biltmoor Moving and Storage Co. v. Shell Oil Co., 606 F.2d 202, 206 (7th Cir. 1979); Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968), and federal question cases, see Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979), vacated on other grounds, 451 U.S. 304 (1981); Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975), when a state long-arm statute was used as the means for effecting service of process. Recently, in his concurring opinion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. June 1, 1982), Justice Powell suggested that such an approach is proper. See id. at 4558 (When a federal district court depends on the law of a state to establish personal jurisdiction, "its jurisdiction . . . normally would be subject to the same due process limitations as a state court.").

The fundamental teaching in this area is that:

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316. The focus for measuring those factors is the "relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Based on that relationship, we must determine "whether the 'quality and nature' of the defendant[s'] activity is such that it is 'reasonable' and 'fair'" to require them to defend against the plaintiff's charges in the Northern District of Illinois. Kulko v. Superior Court of California, 436 U.S. 84, 92 (1978). That determination necessarily depends upon the particular factual contours of this case. Id.

The plaintiff alleges a variety of "contacts" between the defendants and the state of Illinois. Essentially these fall into three categories: (1) the interaction of the defendants with Illinois residents who apply for admission to the California bar (this includes exchanges of information between the parties; submissions of forms, fees, and certifications of education by Illinois residents; notification of test results; and provision of further application forms for Illinois residents who fail an examination); (2) the defendants' use in certain circumstances of the results of Multistate Bar Examinations taken in Illinois,7/ and (3) the fact that there are members of the State Bar of California who reside in Illinois and who receive the association's publications there.8/

7/ The defendants allow applicants for the "general examination" to transfer their scores from recent MBE's taken in other jurisdictions rather than requiring them to retake the examination.

8/ Prior to oral argument, the plaintiff filed a "Motion to Supplement the Record on Appeal, and Motion to Compel Discovery from Defendant or in the Alternative to Compel Discovery by Subpoena to Third Parties," in which he alleged two additional "contacts": (1) that California bar examiners attend a National Conference of Bar Examiner's seminar held in Chicago every two years; and (2) that the State Bar of California obtains information on the character and fitness of out-of-state applicants from the National Conference of Bar Examiners, which is headquartered in Chicago. The defendants did not respond to this motion. At argument, we indicated that we would consider this motion with the case. We now grant the motion to supplement to the extent that we consider the plaintiff's additional allegations. We deny the discovery requests.

Appendix

An essential criterion for establishing the reasonableness of subjecting a nonresident defendant to litigation is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958); see Kulko v. Superior Court of California, 436 U.S. at 96; Lakeside Bridge & Steel v. Mountain State Construction, 597 F.2d 596, 600-01 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). The "contacts" alleged by the plaintiff do not satisfy this requirement. Although they illustrate some factual connection between the defendants and Illinois residents, they do not demonstrate any purposeful activity through which the defendants have availed themselves of the "benefits of conducting business in the forum."9/

This conclusion is consistent with that reached by the Fifth Circuit in Burstein v. State Bar of California, 659 F.2d 670 (5th Cir. 1981), withdrawn pending rehearing, 668 F.2d 795 (1982), a case similar to ours, in which an individual who took but failed the California bar examination attempted to sue the State Bar of California in the Eastern District of Louisiana.10/ In Burstein the plaintiff focused on (1) the interaction of the defendant with Louisiana residents who apply for admission to the California bar and (2) the fact that some California bar members reside in Louisiana as the relevant "contacts." The court concluded that these were not sufficient "affiliating circumstances" to ground personal jurisdiction, noting:

> The State Bar of California does not avail itself of any Louisiana privileges or services. It does not solicit potential

---

9/ We note that in his reply brief the plaintiff, characterizing the defendants as a "state agency," also attempts to rely on more general contacts between the state of California and the state of Illinois as the basis for the court's jurisdiction. (Reply Brief at 2-3.) We reject this argument. The State Bar of California is a public corporation. Cal. Const. art. VI, § 9; Cal. Bus. & Prof. Code § 6001. (The Committee of Bar Examiners in turn is established by the board of the State Bar. Cal. Bus. & Prof. Code § 6046.) The State Bar, as an entity, is expressly amenable to suit. Cal. Bus. & Prof. Code § 6001. Clearly that entity--not the state--is the focus of the plaintiff's allegations. Accordingly, the plaintiff must demonstrate that the entity which it can and is attempting to sue has "minimum contacts" with the forum.

10/ Although the original panel opinion in this case has been withdrawn, we believe that the "minimum contacts" analysis of the facts of that case was sound.

> members in this or any state. Those who wish to sit for its examination take it upon themselves to apply to do so, and the State Bar, as a convenience to such persons, mails the necessary materials to the address given by these applicants. Similarly, the State Bar mails certain materials to members regardless of their place of residence rather than attempting to require that all its members maintain California mailing addresses.

Id. at 674 (quoting Burstein v. State Bar of California, 503 F. Supp. 227, 229 (E.D. La. 1980)). This assessment is equally applicable to the case before us. To the extent that there is any relationship between the present defendants and the state of Illinois, it is generated by the "unilateral activity" of persons who happen to be Illinois residents. Such activity cannot "satisfy the requirement of contact" constitutionally required to sustain personal jurisdiction. Hanson v. Denckla, 357 U.S. at 253; see Jadair, Inc. v. Walt Keeler Co., No. 81-1380, slip op. at 6-7 (7th Cir. May 26, 1982).11/

The plaintiff resists this conclusion by relying on a number of cases in which personal jurisdiction has been successfully asserted over a nonresident defendant. E.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Fisons Limited v. United States, supra; Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365

11/ We recognize that Burstein did not involve an allegation that the defendant used results of MBE's administered in the forum state. Yet we do not find Wein's assertion to that effect sufficient to bridge the gap between the defendants and the state of Illinois. California's use of such examination results is contingent upon the unilateral act of an applicant in submitting his scores. Further, this practice has no effect on the applicant's standing or the defendant's activities in the forum. Finally, we note that Wein himself did not utilize this procedure nor are his substantive allegations in any way tied to the MBE.

We also do not find the plaintiffs belated allegations that California bar examiners attend meetings in Chicago and that the defendants have some dealings with the Chicago-based National Conference of Bar Examiners to be sufficient to satisfy this requirement. This type of sporadic and fortuitous interaction does not implicate the defendants, in any significant way, in activity that is subject to the "benefits and protections" of the laws of the forum state. See Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954, 956 (5th Cir. 1965).

(8th Cir. 1969). These cases, however, are inapposite. In each of them the defendant either exerted significant control in the forum state (Fison), produced substantial effects on business in the forum (Great Western), or reasonably anticipated that a contract to which it was party would have direct consequences in the forum (Cousteau, Electro-Craft). Each of these defendants had some articulable stake in the laws of the forum for enforcement or protection.

In the present case there is no such connection. The defendants have not purposely availed themselves of any privilege of the forum state. Moreover, that state has no significant interest in adjudicating this dispute. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Thus "basic considerations of fairness" dictate that the defendants could not "reasonably have anticipated being 'haled before [an Illinois] court '" Kulko v. Superior Court of California, 436 U.S. at 97-98 (citation omitted); see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Burstein v. State Bar of California, 659 F.2d at 675. The limits of due process would have been transgressed had the court attempted to exert power over the defendants by means of Illinois' long-arm statute. Thus the court's rejection of this jurisdictional base was proper.

B. Discovery

Apart from his substantive jurisdictional argument, Wein also contends that the district court erred by dismissing his action without permitting him to pursue discovery concerning certain contacts between the defendants and the state of Illinois.12/

12/ As explained by the district court, Wein sought information on:

> 1) all income derived by defendant in any way from the state of Illinois, including but not limited to application fee[s] from Illinois residents; 2) the number of applicants for the California Bar exam who have utilized multistate (MBE) scores from examinations taken in Illinois, both at the time Wein took the test and for the past ten years; 3) all communications between the Bar and California Bar members who are Illinois residents; [and] 4) all trips or communications sent to or received from Illinois for the past five years by any member of the California bar which [sic] was connected with the State Bar.

Although discovery concerning factual issues raised by a motion to dismiss for lack of personal jurisdiction may be appropriate in certain cases, a district court is vested with broad discretion in controlling such inquiries. Chrysler Corp. v. Pedders Corp., 643 F.2d 1229, 1240 (6th Cir), cert. denied, 102 S.Ct. 386 (1981); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975). "A ruling by the trial court . . . denying discovery will not be cause for reversal unless an abuse of discretion is found." Chrysler Corp. v. Pedders Corp., 643 F.2d at 1240 (citing H. L. Moore Drug Exch., Inc. v. Smith, Kline and French Laboratories, 384 F.2d 97 (2d Cir. 1967)).

In this case the district court concluded that the information sought by Wein was "only tenuously related to [his] claims, and would not establish voluntary acts by defendants directly or indirectly within Illinois." In effect the court found that the proposed discovery would not be useful to remedy the jurisdictional defect. In light of our analysis of the question of personal jurisdiction, we find no abuse of discretion in the court's treatment of the plaintiff's request. Id.; see Burstein v. State Bar of California, 659 F.2d at 675.

C. Transfer under 28 U.S.C. § 1406

The plaintiff's final argument is that the district court erred by dismissing this case rather than transferring it pursuant to 28 U.S.C. § 1406(a) to a district "in which it could have been brought." Although section 1406(a) is "broad enough to authorize the transfer of [a case], . . . whether the court in which it was filed had personal jurisdiction over the defendants or not," Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962), such a transfer must be "in the interest of justice." A district court has broad discretion to decide if that criterion is met. Brown v. Grimm, 624 F.2d 58 (7th Cir. 1980); De La Fuente v. I.C.C., 451 F. Supp. 867, 872 (N.D. Ill. 1978).

In this case the district court refused to authorize a transfer because: (1) the plaintiff did not affirmatively show that he was barred from refiling his complaint in a proper forum; (2) the action was not substantially advanced prior to dismissal; and (3) the plaintiff never identified which district should receive the case. Based on these factors, the court acted within its discretion in denying the plaintiff's request. See Brown v. Grimm, supra; Lowery v. Estelle, 533 F.2d 265 (5th Cir. 1976) (dismissal does not bar refiling in proper forum).

III.

For the foregoing reasons, the judgment of the district court is affirmed.

Appendix